

RE D (ARTICLE 13B: NON-RETURN)
[2006] EWCA Civ 146

Court of Appeal

Thorpe, Wall LJ and Coleridge J

25 January 2006

Abduction – Risk of physical danger and emotional harm – Rigorous scrutiny of abductor’s evidence – Judicial comments on foreign litigation – Exceptional case involving horrific shooting incident

The English mother and American father had two children, aged 7 and 5, and were habitually resident in Venezuela. The mother abducted the children to England, but was required to return to Venezuela by the English court. After the return the children appeared to be well settled, although they were displaying some challenging behaviour described by a child psychologist as ‘emotional problems’, while the mother seemed in fragile emotional health. The mother and father were engaged in acrimonious court proceedings, including cross applications for custody of the children. In a dramatic incident the mother was then shot at in the family home, at close range, by a hired gunman. She received wounds to her face, a bullet having entered and emerged from her right lower eyelid, and to her right shoulder. The mother suspected that the father had instigated the attack, while the father claimed that he had himself been attacked by unknown assailants for political reasons, and that the attack on the mother was probably similar in motive. The mother already had permission to take the children to England for a holiday, and was allowed to bring the date forward. On arrival in England she immediately cancelled the return flight. The father once again sought the return of the children to Venezuela. At the hearing the judge rejected suggestions that the mother had deliberately exaggerated the consequences of the attack and that she had set out to abduct the children, finding that the mother’s post traumatic stress disorder explained discrepancies in her evidence. The judge also noted that in her opinion the mother would probably, following the attack, have been given permission by the Venezuelan court to remove the children from the jurisdiction. The judge concluded by refusing the father’s application, finding that there was a real risk of physical danger to the children in ordering a return to Venezuela, and that their psychological welfare would be put at risk if the mother returned pursuant to an order for the children’s return.

Held – dismissing the appeal –

(1) In weighing the evidence of an abductor seeking to justify or explain conduct a judge must subject the evidence to rigorous and perhaps sceptical scrutiny. The judge’s exoneration of the mother was insufficiently critical and had failed to catch the realities of the mother’s motivation and conduct. However, if the mother’s motivation and conduct were critical factors in the case, there ought to have been oral evidence on these well-defined issues, whereas the father’s counsel had taken the tactical decision not to seek such evidence (see paras [16], [17], [19]).

(2) It had been inappropriate for the judge to speculate as to the outcome of continuing proceedings in Venezuela. The judge would have been wiser not to have introduced the continuing proceedings in Venezuela within the passage in the judgment in which she explained how she exercised her discretion consequent; it would more happily have been introduced into that part of the judgment dealing with the litigation history with a note that any issued undetermined application for permission to relocate permanently was something which was indicative of a resolution to escape the confines of the Venezuelan legal system (see para [26]).

(3) In the exceptional circumstances of this case, involving a specific and targeted risk of physical harm to the children and extremely strong evidence of a risk of

emotional harm, the children should not be returned. The case involved extremes of violence and of danger which made it almost inevitable that the court would conclude that the children would be at significant risk if returned to Venezuela (see paras [28], [30], [34]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980,
Art 13(b)

Cases referred to in judgment

S (Abduction: Custody Rights), Re [2002] EWCA Civ 908, [2002] 2 FLR 815, CA

Zaffino v Zaffino (Abduction: Children's Views) [2005] EWCA Civ 1012, [2006] 1
FLR 410, CA

Timothy Scott QC for the appellant

Henry Setright QC for the respondent

Cur adv vult

THORPE LJ:

[1] The parties to this appeal are in their early forties. The father is American. The mother is English. They married in May 1995 and have two children. A, who is 7 and B, who is 5. Between the births of the two children, the family established itself in Caracas, Venezuela. They lived there until the mother's departure on 20 April 2002 to this jurisdiction, her homeland of course, without the father's consent or any permission from the local court.

[2] The predictable result was the issue of an originating summons under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), on 18 June 2002, and an almost equally predictable order for return made by Hedley J on 18 October 2002. Between the making of that order and the departure of the mother and children on 13 November, it seems that she obtained a divorce and a final order for ancillary relief. The order has proved to be of little value since the father has no assets here and enforcement was subsequently refused by the court in New York, the court to whose jurisdiction the father is subject.

[3] Following the mother's return, the family's circumstances are thus recorded by Macur J in her judgment of 15 December 2005 which we now review. The judge said:

'The children were resident with their mother with liberal contact to their father. The children were apparently well settled albeit displaying some disruptive/challenging behaviour described by a child psychologist as "emotional problems". The mother was in fragile emotional health. The parties are engaged in prolonged and acrimonious court proceedings relating to the breakdown of their marriage which include cross-applications for custody of the children, the mother's application to leave the jurisdiction and ancillary relief disputes.'

[4] The most dramatic event occurred on 28 June 2005. It is described by Macur J in her judgment:

‘On 28 June 2005 at about 3.30 pm at her home address in Venezuela the mother was victim of an apparently pre-meditated, targeted and serious firearm assault. She was shot at close range and received wounds to the face (a bullet entering and emerging from her right lower eyelid and splintering the bone of her zygomatic arch) and right shoulder. She was identified before she was shot. She attempted to escape. I consider that she was fortunate not to have suffered permanent physical disability or death. I consider it to be a matter of luck rather than design, given the time of day and location of the shooting, that the children were not present. Her assailant is a young Venezuelan national, arrested as he left the scene and charged with “frustrated homicide”, who has alleged that he was hired to shoot the mother in order to frighten her. Another person has been arrested and charged as an accomplice. Neither is known to the mother. The person who “contracted” the shooting is unknown and still at large. The motive behind the shooting is unclear.’

[5] In relation to that shocking incident, the father was later to say within the New York proceedings that in May 2005, he had been subject to a similar attack by five assailants in broad daylight with knives and guns. One of the perpetrators was caught and confessed that he was paid to be there to get the husband. The husband further said that another such incident had taken place outside his house more recently. His explanation within the American proceedings, was that he may be perceived as espousing interests that run contrary to that of the existing government.

[6] At the date of the shooting, the mother already had permission from the judge in Caracas to bring the children to this jurisdiction for a summer holiday between late July and late August. She had arranged a return flight with American Airlines to cover the requisite travel. However, in consequence of the terrifying episode of the 28 June 2005, the mother applied, without notice, to the court in Venezuela for permission to accelerate the summer holiday. That permission was granted and accordingly, the family travelled to this jurisdiction on 9 July 2005. The intended date of return was still the date originally set by the court in Caracas, 25 August. However, having arrived in this jurisdiction, on 18 July the mother notified American Airlines that she was cancelling the return flight. The advantage to her of that notification was that the ticket could be utilised on any date prior to 9 July 2006, providing that the journey commenced with an outward leg from Caracas.

[7] The notification was clearly indicative of the mother’s intention not to honour the order of the Venezuelan court and that indication was strengthened by the issue of wardship proceedings in this jurisdiction. Again predictably, the father issued an originating summons under the Child Abduction and Custody Act 1985 for an order for peremptory return. The proceedings were issued in September. There were directions appointments, culminating in the one and a half day trial before Macur J. At the end of the hearing, she reserved her judgment, which she handed down approximately 7 days later.

[8] By her judgment, she upheld the only defence raised by the mother to the originating summons, namely a reliance on Art 13(b) of the Hague

Convention. There were indications that the father would appeal that order and various extensions of time were given expiring on 17 January 2006. On that very day, this court received the appellant's notice supported by a skeleton argument settled by Mr Scott QC who had appeared in the court below. Given the imperative need to dispose of appeals in Hague Convention cases with the same expedition that is demanded of the court of trial, I expedited this hearing, which is formally constituted as an oral permission application on notice, with appeal to follow if permission is granted.

[9] I say straight away, that we have treated this as the hearing of an appeal and in due course I will propose to precede the dismissal of the appeal with an order granting permission. Mr Scott, in his vigorous submissions, has relied on three principal grounds. He has attacked the judge's evaluation of the mother's evidence, given that it was demonstrated that on two specific matters she had been less than frank. Mr Scott's second ground criticised the judge for accepting the evidence of the consultant adult psychiatrist, Dr Turner, when it had been demonstrated that in a number of areas Dr Turner had forsaken the necessary objectivity of the expert to enter the litigation arena. Mr Scott's third criticism of the judge, was that she had impermissibly attached weight to aspects of the continuing Venezuelan proceedings, or had impermissibly failed to attach weight to other aspects of those proceedings, with the consequence that the exercise of her discretion was flawed.

[10] I take those three points in turn. As to the mother's evidence, Mr Scott had demonstrated flaws in two narrow areas. In her first affidavit within English proceedings, she had said that following her discharge from the clinic, where she was treated for her wounds, she had been put in a place of hiding with the children and had been directed to tell no one but her lawyer and most trusted friends. She had added in the paragraph that she had not had any thoughts of not returning to Venezuela. She had not thought about it at all. She had just wanted to get out of Caracas. She concluded by saying that she and the children had remained in that place of hiding until 9 July 2005 when they had left for the flights for England.

[11] The evidence of a Venezuelan lawyer filed on the husband's behalf, was to this effect: on 7 July, he had attended a charity ball in the Salon de Fiestas, Caracas. It was a charity event, put on by the Asociación Ayuda a un Niño. There were about 350 people at the event. The Salon was a well known party hall. The mother was at the event, accompanied by a well-known Venezuelan, who was said to be her boyfriend. All this the mother sought to excuse by saying that it was a long-standing commitment, that she had attended relatively briefly and had been largely disorientated throughout the evening. Inevitably, those exchanges founded the submission from Mr Scott that she had deliberately exaggerated the consequences of the attack and that she had deliberately misrepresented the history to the London judge.

[12] The second area of Mr Scott's criticism related to the purchase of the tickets for the flights. The mother had presented her case on the basis that having arrived in this jurisdiction, she had sought to recover the return leg of the unused tickets. In her affidavit, that was her case. Mr Scott, however, was suspicious and asked her at the directions hearing for verification. Accordingly, a letter was written on 17 October by the mother's solicitors as follows:

‘It was her intention to utilise the unused portion of the American Airlines ticket as per the attached copies.’

[13] To that letter was annexed a photostat copy of the ticket for the return flight. So the case presented was that she had, at the point of departure, utilised a new single ticket because the American Airlines outward leg was fixed for late July. She had, however, the intention of using the return leg on the due date, namely 25 August. That presentation was demonstrated unsound when Mr Scott’s instructing solicitors obtained evidence from American Airlines to the effect that it was impossible for a traveller to utilise the return leg if the outward leg had not first been taken up. The same source provided also the information of the mother’s cancellation on 18 July 2005.

[14] All that again enabled Mr Scott to submit to the judge that the mother had deliberately obfuscated or misled the court in an endeavour to conceal her real intention formed prior to her departure on 9 July to breach the Venezuelan return order specifying a conclusion to the summer holiday on 25 August.

[15] Now, how did the judge deal with those criticisms surrounding the charity ball? In para [12] of her judgment, she had this to say:

‘[The mother’s] “excuses” appear lame and realistically draw critical comment. However, I note that she had not been advised upon or treated for the inevitable emotional impact of the attack upon her at this time. I accept, of course, that it may be consistent with a woman exaggerating her symptoms to suit her own ends, but as I indicate below, whilst bearing in mind the criticisms levelled against the medical reports in these proceedings made by Mr Scott QC, I am satisfied that the mother is suffering from post traumatic stress disorder and was likely to have been so suffering in July 2005.’

[16] In weighing the evidence of an abductor seeking to justify or explain conduct, the judge needs to subject the evidence to rigorous and perhaps sceptical scrutiny, particularly where, as here, there is a history of previous abduction and an outstanding application for permission to relocate. I would repeat what I said in the case of *Zaffino v Zaffino (Abduction: Children’s Views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410:

‘Cases in which the court of the requested state then by order validates such conduct must be exceptional indeed.’

the conduct in question being the unlawful removal pending the determination of an outstanding application for permission to relocate. The obvious reason for that stricture is that the abducting parent achieves the desired goal by unlawful, rather than lawful, means.

[17] It seems to me that in the present case, the judge’s exoneration of the mother was insufficiently critical, and in consequence failed to catch the realities of the mother’s motivation and conduct.

[18] The same can be said of the judge’s exoneration of the mother’s evidence in relation to the tickets. The judge said:

‘My finding as to the mother’s mental state also goes to my assessment of the circumstances surrounding the air tickets and the interpretation I am invited to place upon it ... Mr Scott QC asks me to take notice of the fact that an “e-ticket” will only be valid for return flight if outward journey is completed. I was not aware of the same and do not hold it as a matter going to the mother’s detriment.’

[19] All that said, if the mother’s motivation and conduct were factors critical to the outcome, oral evidence on these well-defined issues was necessary. She was entitled to explain herself to the judge and Mr Scott’s interpretation of the history needed to be plainly put to her. Mr Setright QC suggested oral evidence to the judge and Mr Scott either opposed or stood silent. That tactical decision weakens the criticisms that Mr Scott now advances.

[20] Mr Scott’s second attack is upon the evidence of the expert, Dr Turner. The attack particularly focuses on his third report which resulted from a permission from the court for the release of some of the court papers and, particularly, the rival contentions of the parties. In commenting on the mother’s affidavit, the expert sought to take her side by broadly asserting that her assertions were consistent with what she had said to him in consultation.

[21] The judge, it seems to me, dealt with this point very fairly. In her judgment, she carefully said, at para [18]:

‘Nevertheless, where I perceive that Dr Turner has strayed into the arena I disregard his views. I take account only of the medical diagnosis and prognosis made upon facts as I find there is sufficient evidence to support and not their determination of the facts.’

[22] To like effect, in para [22], whilst accepting one criticism from Mr Scott of the first report, she said:

‘As to [that], I agree, but do not find the diagnosis and prognosis diminished thereby.’

[23] Finally, in para [24], she said:

‘I accept the majority of the submissions made by Mr Setright QC as to the value of the medical reports. I summarise, Dr Turner’s curriculum vitae shows he is patently expert in the field of PTSD. The nature of the shooting gives rise to the logical conclusion that there will be some emotional impact. Dr Turner’s diagnosis is hardly surprising. The previous depressed disposition of the mother will not have assisted her resilience in the face of such an attack.’

[24] That final conclusion and evaluation of Dr Turner’s evidence seems to me to be fully justified and equally fully to take account of Mr Scott’s criticisms.

[25] Turning to Mr Scott’s third point, he asserts that the judge was quite wrong to say in summary of the continuing Venezuelan proceedings:

‘There is already ongoing and extensive litigation being conducted in a competent jurisdiction in which the mother has been able to participate in the past. In the absence of evidence to the contrary and assuming the application of similar legal principles to the United Kingdom I deem it likely that her application to remove the children from the jurisdiction would be viewed favourably in the light of Dr Salcedo’s report. Whilst there is an application for sole custody by the father, unless the mother’s actions are deemed so unreasonable, I assume for the purposes of my exercise of discretion that it is unlikely to succeed.’

[26] Mr Scott makes the sustainable criticism that it was inappropriate for the judge to speculate as to the outcome of continuing proceedings in Caracas. However, there are inevitable limitations to the force of the point. The existence of an outstanding application for permission to remove permanently rests on an acceptance in the mother’s earlier affidavit. It is nowhere particularised or amplified in any evidence filed by the father or by his Venezuelan lawyer. We have searched the affidavits of that expert, Señor Mendez, and can find nowhere any mention of the issue of an application for permission to relocate permanently, or any evidence as to its progress, or as to its subsequent state. It seems to me that the judge would have been wiser not to have introduced the continuing proceedings in Venezuela within the final passage of her judgment, in which she explains how she exercises her discretion consequent upon her upholding of the Art 13(b) defence. It would more happily have been introduced into an earlier stage of the judgment establishing the litigation history and noting that any issued undetermined application for permission to relocate permanently was something which was indicative of a resolution to escape the confines of the Venezuelan legal system.

[27] Now, having thus reviewed the impact of Mr Scott’s submissions, they must be put in proper context. The risk of abuse and resultant harm to an abductor and to a child after return is usually assessed in the familial context. A generalised risk has been considered in a number of jurisdictions in relation to Israel, when violence within the state was at its height. In our jurisdiction, that is illustrated by the case of *Re S (Abduction: Custody Rights)* [2002] EWCA Civ 908, [2002] 2 FLR 815.

[28] However, here the risk of harm was specific and targeted. The judge’s findings are all important in this regard. At para [30] of the judgment, she assessed the risk of physical danger to the children if returned to Venezuela. She said:

‘There is a real risk of physical danger to the children. The mother was victim of a pre-meditated, targeted, terrifying and life threatening attack. The father claims to have been victim of similar and more ferocious attacks. The children are known to be associated with their parents by the past action of the father. The children have not been subject to any attack and are less likely to be targeted victims than their parents but are in danger of physical injury if present with either of their parents at the time of such attacks. The attacks upon each parent were indiscriminate in choice of timing and location – that is in the daytime and outside the home address of each – to avoid any suggestion that the assailant had relied upon the absence of the

children. The use of firearms and other weapons carries the inevitable risk of serious injury. The risk to the children maybe classified as grave not only in terms of its likelihood, as indicated by past multiple events, but also in terms of its potential outcome, namely serious disability or death. Security measures could be enforced which contemplated 24 hour constant supervision by armed guards. This in itself would not provide complete protection but would diminish the risk somewhat. But for the other conclusions I draw below, it may have been sufficient to undermine the mother's defence.'

[29] In my judgment, there is force in Mr Setright's criticism that, the judge having found the real risks of physical danger to the children as vivid and as oppressive as she did, it is hard to see how the alleviating potential of security measures could cast doubt on the validity of the mother's Art 13(b) case founded on physical risk. I, myself, think that there is force in Mr Setright's submission that on the judge's findings, her concluding sentence necessarily had to be more strongly expressed, namely that the physical risks alone would have been sufficient to establish the defence and that would have been the end of the case.

[30] But whether that is right or wrong, the absolute answer to Mr Scott's appeal lies in the judge's further findings in relation to emotional harm. The judge had extremely strong evidence. The evidence of Dr Salcedo was evidence to which the judge attached utmost persistence. It was to the effect that when assessed in Venezuela prior to the dramatic assault, child A was a disturbed child who would not leave her mother. That led the Venezuelan expert to the conclusion that from a psychological standpoint, it was important that the girls remain with their mother, in a place where the latter enjoys stability, to enable the daughters to acquire emotional stability. Of equal or perhaps even greater importance was the evidence of Dr Fuggle, the consultant child psychologist, part of the Islington CAMHS Team. In his first report of 28 September, he said:

'On the basis of reported conversations between [the mother] and her children, the children are aware that she would prefer to stay in this country because she feels unsafe in Venezuela. In this way, we consider that the children are likely to be fearful and anxious about the safety of both their mother and themselves if required to return to Venezuela. This is not a comment on the relative safety of Venezuela as a country for children, but only that for [these children] their sense of safety will be mediated through the experience of their parent and, in this case, the parent has good cause to feel highly anxious in that country ... We would, in general, be highly concerned about whether a return to Venezuela would be in the children's best interests.'

[31] In his later report of 21 November, Dr Fuggle said:

'If increased stability, both psychological and practical, is not achieved then clearly there will be a risk that these anxiety problems will become a more enduring component of both children's psychological development.'

[32] That expert evidence led to the judge's strong point at para [30](2) of the judgment to this effect:

'The children are anxious for their own safety and their mother's safety and have heightened emotional problems as a result of the shooting, which are unlikely to abate and may well increase if they were to be returned to Venezuela. Their psychological welfare is therefore put at grave risk beyond the normal disruption of an enforced return to their habitual residence and beyond the problems identified by Dr Salcedo in her July 2005 report. There is no measure which can diminish this risk to an acceptable level.'

[33] So, in sum, it seems to me that even were Mr Scott to have established at a trial before a more sceptical judge that the mother's motivation at the point of departure was to effect a wrongful removal which she had not succeeded in effecting by lawful proceedings, even if she had from the outset the intention of breaching the Venezuelan order, all that is out-trumped by the awful events of 28 June 2005 which inevitably lead to the conclusions succinctly expressed by Macur J.

[34] This is, in truth, an exceptional case on any yardstick. The events of 28 June were so horrific that it would simply be fanciful to imagine that they would not have damaged the mother's psychological wellbeing, not just transiently but in the long term. The real issue in the case was what would be the effect on the children, were the court to order their return. The conclusion expressed by Dr Fuggle, and accepted and adopted by the judge, was an almost inevitable conclusion given the extremity of the violence and the extremity of the danger experienced by the mother on 28 June. Although Mr Scott has made his characteristically concentrated endeavour to get this appeal on its feet, it is simply an attack that ignores the underlying realities.

[35] In my judgment, Macur J came to precisely the right conclusion for the reasons that she has eloquently explained in her judgment. Given that this is an application brought by the central authority, I would grant permission but dismiss the resulting appeal.

WALL LJ:

[36] I agree. This is self-evidently a wholly exceptional case, factually speaking. The learned High Court judge's evaluation of the risks, physical and psychological to the mother and accordingly through her to the children, arising out of the attempted assassination on 28 June 2005, bring the case clearly within Art 13(b). However good the points relied on by the appellant, they did not seem to me to undermine the judge's careful evaluation of the fundamental Art 13(b) risk. I too would give permission to dismiss the appeal.

Application refused.

Solicitors: *Brethertons* for the appellant
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PHILIPPA JOHNSON
Law Reporter