

EMERGING ISSUES IN INTERNATIONAL FAMILY LAW – PART 2

Possibilities and challenges to providing effective legal remedies in cases of transnational marriage abandonment

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Abstract

(This article intentionally refers to a wife rather than a spouse when discussing transnational abandonment. The application of the law would naturally be gender neutral but the writer has only dealt with cases involving abandonment of women and will therefore discuss specific issues relating to women, especially women from South Asia.)

This is the second article in a tripartite series of papers about transnational marriage abandonment of women. The first article in this series outlines three forms of transnational abandonment of women. In this article we focus on the second category of abandonment where a wife is abandoned abroad by her husband who returns to England with her travel documents. Within this category we discuss cases where children are involved who in the majority of cases remain living in England while their mother is abandoned abroad. A common theme running through all these cases is that the wives are subjected to domestic servitude, isolation and domestic violence by their husbands and in-laws during the perpetuation of the marriage on the basis that their immigration status is insecure. We will also touch upon legal remedies that are available to women who fall within the third category of abandonment, having never been sponsored to the UK following marriage, and explores the lack of safeguards and redress available to them within the family law arena – what is referred to as the “justice gap” in the first article.

Stranded Spouses and development of case law

There has been growing case law around the second category of abandoned women who are able to start family proceedings in England on the basis of their British national or resident children. These cases are identified by the judiciary as stranded spouse cases and they involve actions in wardship which are taken by the abandoned mothers in the English High Court on behalf of their children. The High Court is able to exercise its inherent jurisdiction and make the affected children wards of the High Court under s 1(2) of and Schedule 1 to the Administration of Justice Act 1970. Wardship cases are entitled to public funding even whilst the mother and/or the children are abroad. Family judges consider the welfare of the affected children as their paramount consideration and they make requests that the mother should be assisted to return to England by the Home Office so that she can be reunited with her children and so that she can participate in the family proceedings. However, immigration control often remains the main stumbling block and abandoned mothers are routinely denied visas to return to the UK even in cases where their children remain living here. What follows is a long period of separation between a mother and children which can stretch to years and in some cases becomes permanent. In cases where the mother is able to return to England other issues emerge especially where there has been a long standing separation between her and the children and where she is financially destitute.

The leading case in this area is the case of *Re S (A Child) (Guidance in cases of stranded spouses)* [2010] EWHC 1669 (Fam) where Mrs Justice Hogg provided some useful guidance for judges and practitioners. Justice Hogg was keen to ensure that the rights of the parties and the child under Articles 6 and 8 of the ECHR are upheld and she made a plea to the ministers concerned that there should be some consideration as to what arrangements can be put in place to assist abandoned mothers to return to this country. The Court directed that at the first hearing (on an ex parte basis) the making of a Tipstaff Passport order should be considered (so that the police as agents of the tipstaff search for and seize the mother's passport from the father's house where it is alleged that the father has taken it). There should be a court request for disclosure from the Home Office in form EX660 to ascertain the spouse's immigration status so that she can immediately make arrangements to obtain an expedited visa. At an early stage the Court must determine whether a fact-finding hearing should take place considering the gravity of the allegations and whether a Cafcass officer should be appointed to represent the child(ren). In most cases there are allegations of serious incidents of domestic violence and domestic servitude as explained above. A welfare check is also usually carried out on the affected child. More importantly the court must consider making appropriate recitals in

directions orders which may assist with the abandoned wife's application for a visa to enter/re-enter the jurisdiction.

Immigration Controls

Since the case of *Re S* immigration controls have become tighter. Dogmatic officials routinely refuse abandoned mothers' visas even where they have started wardship proceedings in England on behalf of their children and the English courts continue to make requests to immigration authorities. In another case, *N v A (Abduction from Pakistan) [2012] EWHC 3954 (Fam)*, that came before Justice Hogg in 2012 a mother was denied a visa where her three year old daughter was in England. She again issued a plea to the immigration authorities and noted that a hearing by way of video link is not as effective for the mother and is much more costly for the taxpayer.

In the case of *Akhtar v Ayoub [2013] EWHC 3840 (Fam)*, Mr Justice Holman discharged the wardship of four children who had been permanently separated from their mother as a result of her being stranded in Pakistan. Justice Holman noted that a series of requests had been made by the court in orders to the Secretary of State to assist the mother but her visa had been denied regardless of such requests. He also noted that video links from Pakistan almost always break down and "*degenerate almost into farce*". There was no effective way the mother could participate in the proceedings. He saw no reason for the wardship to continue even though no fact finding into the mother's allegations of abandonment by the father had been made.

In the case of *ZM v AM [2014] EWHC 2110 (Fam)*, the High Court was concerned about the abuse of immigration control by the father, which led to a forced separation between a mother and her severely disabled child for three years. Mr Justice Peter Jackson noted:

"Where one party to a failing marriage has secure immigration status and the other does not, the opportunity arises for the former to exploit the latter's weakness by taking advantage of immigration controls."

He opined that the denial of the mother's entry clearance to return to the UK was a wholesale breach of her Article 8 right.

Following this in *Saima Bi v Imran Mohammed [2016] EWHC 506 (Fam)*, a mother alleged that she had been stranded by her husband and forcibly separated from her four year old child.

The court made several requests to the Secretary of State to assist the mother to return to the United Kingdom but her visa had been rejected on two occasions. Thankfully Justice Holman distinguished *Akhtar v Ayoub* because the mother had appealed the decision of the Entry Clearance Officer and she did not rule out that her daughter should be returned to her care in Pakistan.

Jurisdiction of the High Court in wardship applications

It is imperative that in stranded spouse cases, the mother is able to initiate proceedings without a long delay. Where there has been a long delay the jurisdiction of the English Court becomes tenuous especially if the child(ren) are also abandoned with their mother. The question that arises is whether a child who has now been living in a foreign country of which s/he is also a national through his or her mother still retains habitual residence in England. Where the child(ren) are in England it becomes more cumbersome for the Court to return them to their mother's care where they have become settled in the care of their father. Another pitfall is obtaining public funding where there has been a long delay.

In reality there is almost always a delay - in the majority of cases from around six months to several years. Very often the abandoned mother relies on family assurances and hopes that at some stage the father and paternal family members will assist her to return to England. Many are unable to read or speak English and have no idea that they must start proceedings in England.

The leading case in this area is the case of *A (Children) (AP) [2013] UKSC 60* where a mother was abandoned in Pakistan along with her three children. She gave birth to the parties' fourth child in Pakistan. Despite the fact that the fourth child had never been to England the Supreme Court unanimously allowed the mother's appeal and held that the court had inherent jurisdiction to make the return orders in this case on the basis of fourth child's British nationality.

Since the above case of *A (Children) (AP)* it may become easier to prove that a British child's habitual residence has not been lost despite a long delay in taking proceedings. In a more recent case, *AM v ZM* (mentioned above) it had taken the mother over three years before she started proceedings in England and Mr Justice Newton ultimately decided that her child should live with her despite the long separation.

The above cases are positive examples that highlight a mother's ability to initiate proceedings successfully and to obtain public funding despite a long delay but there is no general rule. There are several cases where public funding is denied on the basis that it has been too long. In one unreported case dealt with by one of the authors, public funding was denied on the basis that it had been three years since the mother was abandoned. On appeal it was refused again even though the children evidently retained their habitual residence in England. In two other unreported cases dealt with by the one of the authors, mothers claimed that they were stranded in Pakistan about 10 years ago and they were unable to initiate proceedings. Since the cuts in public funding it is difficult for long-term abandoned mothers and children to find legal remedies. They are unable to start private law children proceedings for lack of funds and no acceptable evidence of the abandonment or other domestic violence. Under Legal Aid, Sentencing and Punishment of Offenders Act 2012 acceptable forms of foreign evidence of domestic violence is restricted to ongoing criminal proceedings or an unspent conviction for a domestic violence offence, both of which are impossible to obtain where the alleged perpetrator is living abroad.

Divorce and Children Proceedings

In many cases husbands approach the English Family Courts for a divorce and/or child arrangements order after abandoning their wives. It is vital that Cafcass officers and judges are alert to factors that suggest that a wife is missing. In our experience, the abandoned wife is rarely served with the divorce proceedings. Evidently there is a need for further enquiry to establish the wife's whereabouts and to sign post her to organisations such as Reunite or Southall Black Sisters where she can obtain assistance.

In the above case of *ZM v AM* (mentioned earlier), the father applied for a residence order for the child after abandoning the mother in Pakistan. He provided the Cafcass Officer appointed with a false telephone number for the mother and she carried out interviews with someone impersonating the mother. The Judge noted that there were errors in the court process and no one was alerted to signs that something was wrong.

“Unfortunately, in this case the court process provided no protection for the rights of the mother or child. There were a number of indicators that should have alerted the court to the fact that it was not getting the whole story.”

In other cases, husbands initiate divorce proceedings in the wife's home country where she is abandoned. Where divorce proceedings are initiated in England the wife is usually at a loss as to how to participate in these proceedings from abroad and is often unaware that a decree absolute can be granted without her having ever participated. Where proceedings are initiated in the wife's home country they suffer perhaps a worse fate because they are unable to obtain any financial relief upon divorce because the husband's assets and income remain in England. In addition they become limited to seeking financial relief in England after a foreign divorce. It is more complicated to obtain financial relief after a foreign divorce. A party can seek this under the Matrimonial and Family Proceedings Act 1984 Part III provided they are able to satisfy certain conditions.

Welfare of Children

It is fair to say that it is easier for mothers to resume care of their children when the abandonment is not long-standing. In many cases the left behind children are never given a proper explanation about their mother's disappearance and they do not have any contact with their mother for the duration of the abandonment. Often children have been told that their mother has died or that she has willingly left them. To reinstate contact becomes a struggle and it not only requires the expertise of trained and experienced Cafcass Officers but consistent manoeuvring by the Court. In the case of *AM v ZM [2014] EWHC 2110 (Fam)* the court was forced to place a child in foster care until she was able to re-establish a relationship with her mother and sister. In cases where the mother and children have been separated judges usually keep the wardship proceedings alive until there has been a fact finding hearing and the court is able to make a final welfare disposal but this is not always the case. Problems do arise where cases are discharged before a fact finding of the abandonment has taken place. Where there is no finding of domestic violence which is usually made in a judgment after a fact finding hearing has taken place, abandoned mothers are unable to obtain public funding for seeking financial relief upon divorce or for engaging in children proceedings which are usually instigated by the fathers once the mother returns to the UK.

Financial Relief for Abandoned Wives

A majority of abandoned spouses do not have secure immigration status when they return to England. Once they return they attempt to regularise their position. For those who have children living in the UK they may be able to gain a right to remain on the basis of Article 8 ECHR but they cannot access public funds for up to 10 years. This is a major hurdle for a court when

considering whether to hand over the care of the children to their mother. In contrast, the fathers are usually in employment and are residing rent free in the home of the larger paternal family. In one case the mother who was living with the children could not get child benefit and child tax credits even though the paternal grandmother was claiming these for the children previously.

An evident solution is that all abandoned wives should be able to make an application for maintenance in England but this is dependent upon obtaining public funding to litigate. The High Court is able to exercise its inherent jurisdiction to order maintenance under section 27 of the Matrimonial Causes Act 1973 during the wardship proceedings which provides the mother and children with some temporary relief. A related issue is that of dowry which is discussed in the third article in this series series (P Patel et. al., 'Emerging issues for international family law Part 3: Transnational marriage abandonment and the dowry question' (Family Law Journal, 2016)).

In practical terms, with the cuts in public funding, there is hardly any legal remedy available to the third category of abandoned women, who have never resided in the UK. It becomes impossible for them to engage in proceedings in England for divorce or financial remedies in the form of spousal support, division of capital or child maintenance because they are unable to afford the costs of litigation and are unable to obtain public funding. In several cases women have obtained orders for maintenance or financial relief upon divorce from their domestic courts but they cannot enforce them in England & Wales. Whilst England & Wales has ratified international treaties on reciprocal enforcement of maintenance orders, the enforcement mechanism is not well understood or widely practised. For example, in Pakistan, there is not even one reported case under the Convention on Reciprocal Enforcement of Maintenance Orders. As discussed in S. Anitha et al ('Emerging issues for international family law Part 1: Transnational marriage abandonment as a form of domestic violence' (Family Law Journal, 2016)), many of the marriages that end in abandonment spring from a desire on the husband's part to misappropriate the inheritance of the wife which is usually in the form of dowry gifted to her by her parents. The right to re-claim their dowry or pre-marital assets becomes impossible to pursue through the civil or criminal justice system in the UK not only because the wife is not present to give evidence but also because the justice system is not properly equipped to deal with such claims. This is explored further in the third article in this series.

Conclusion

It is evident that there is a “justice gap” for the second and third categories of abandoned women. Where there are children involved who are retained in England, there is a greater opportunity for abandoned women to gain access to remedies through the family courts. In these cases, family courts provide assistance to mothers to return to England and their decisions can sometimes have an impact on the immigration authorities. But this is not true in all cases and there exist a number of cases where women have become permanently separated from their children.

Women who are abandoned in their home countries with their children are able to initiate wardship proceedings but they are unable to satisfy the immigration rules when attempting to return to England. The vast majority of these women do not gain entry clearance. In some cases they are able to appeal to the Immigration Tribunal but they are unable to satisfy the Tribunal that their Article 8 right to a family life is infringed since their children are living with them. It is imperative for the family justice system to provide abandoned women and their children with financial remedies which is discussed further in the third article in this series. Foreign evidence of abandonment such as police complaints or letters from women’s shelters should be recognised as evidence of domestic violence for the purposes of obtaining public funding for these proceedings.

Another area which has been ignored is the reciprocal enforcement of maintenance orders (“REMO”) from foreign jurisdictions such as India and Pakistan. More attention needs to be paid to the working of REMO with regard to maintenance orders made in South Asian countries. It is perhaps time for strategic litigation in this area.