## MARTINEZ v. MOUMEN

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.):
September 27th, 1993

*Family Law—children—custody—applications by third parties—child's welfare paramount consideration—if Moroccan and Gibraltarian applicants equally capable of caring for Moroccan child, parents' wishes and desirability of adoption into same religious and cultural group may prevail over grant of custody to Gibraltarian*

The plaintiff applied for custody, care and control of a ward of court.

The respondent, a Moroccan guest-worker, gave birth to an illegitimate baby in Gibraltar, having kept the pregnancy a secret from her family for fear of their disapproval. She originally rejected the child and expressed the desire that someone else should take care of him. The alleged father of the child denied paternity and did not wish to have anything to do with the child. The baby was offered by the defendant to the plaintiff, a ward sister at the hospital, who agreed to take care of him.

The appellant, a Catholic by faith, commenced adoption proceedings and her solicitor obtained the respondent's signature to a document purporting to give custody of the baby to the appellant. The mother consented to this arrangement on the conditions that he be raised a Muslim and be named accordingly, and that she be allowed access to him. However, she later told the appellant that she wanted the child back and refused to give her consent to formal adoption. The appellant obtained a wardship order.

The respondent's married sister later came forward as a potential adopter of the child in Morocco. The Social Services Department supported this course of action but psychologists for the appellant opined that a change of custody could cause the child emotional harm. The respondent had become engaged, but her fiancé knew nothing of the child's existence and she did not intend to tell him for some years to come.

The Supreme Court ordered that although the appellant was a suitable carer for the child and notwithstanding the risk of emotional upset, it was in his best interests that he return to Morocco to live with his aunt. His needs for a cultural identity and contact with his natural mother would be best met in this way. The child would remain a ward of court until his mother was ready to leave the jurisdiction and temporary care and control was given to the Social Services Department. The proceedings in the Supreme Court are reported at 1993–94 Gib LR 92.

On appeal, the appellant submitted that the court (a) had failed to consider the child's welfare as its paramount consideration, since it had

ignored the uncertainty inherent in the respondent's own marital circumstances, and the opinions of child psychologists; (b) had erred in finding that the respondent never intended to give up her child to the appellant permanently; and (c) had been unjustified in finding that the child's own country was Morocco, since paternity had not been established.

The respondent submitted that there had been no reason to make the child a ward of court in the first place, since there was no apparent danger to the child at the time of the hearing.

**Held,** dismissing the appeal:

(1) The Supreme Court had properly determined that the welfare of the child was the first and paramount consideration in wardship proceedings. This was a matter for the judge's discretion and would only be interfered with on appeal if the judge had applied the wrong principles or applied the principles incorrectly. In this case, although the appellant clearly held a different view of the child's best interests, the court had been entitled to decide as it did (page 137, lines 37–45; page 140, lines 8–20).

(2) There was sufficient evidence to support the court's finding that the respondent had not intended to part with her child permanently or at least changed her mind on this matter, although she may have been duplicitous with the appellant out of a desire to conceal the child's existence and ensure his well-being. Furthermore, the court had legitimately concluded, taking into account his mother's wishes, that he would be better raised in the Muslim religion and culture by a family member and with his mother close at hand, despite the possibility that her circumstances would change in future. It had clearly formed the view that the appellant underestimated the problems of raising a Muslim child in a Christian home. Applying Gibraltar law in the absence of evidence of Moroccan law, it was entitled in the circumstances, to find that the child was of Moroccan extraction even though paternity had not been established. The weight to be given to the opinions of social workers and child psychologists was a matter for the court also. Although there may have been other matters on which the court misdirected itself, the Court of Appeal would ultimately have reached the same decision (page 138, lines 27–35; page 139, lines 11–38; page 140, lines 1–7; page 141, lines 3–43; page 142, lines 9–38).

(3) It was doubtful whether the appellant's initiation of wardship proceedings had been necessary in the first place, since any fears for the child's safety were in the past and his illegitimacy, although a matter of social stigma in Morocco, did not in itself justify the form the proceedings took. Nevertheless, the order had remained in place as a means of easing the child's return to the respondent, custody being given to the Social Services Department so as to prevent further bonding between the appellant and the child, to avoid emotional trauma for the parties when the child was handed over, and to allow access for the respondent without the need to visit the appellant's home pending the respondent's return to

Morocco. These orders would continue until the respondent was ready to leave for Morocco (page 138, line 36 – page 139, line 10; page 139, lines 39–43; page 140, lines 20–39).

**Case cited:**

(1) *E. (S.A.) (A Minor) (Wardship: Court's Duty), In re*, [1984] 1 W.L.R. 156; [1984] 1 All E.R. 289.

*D.J.V. Dumas* for the appellant;
*S.P. Triay* for the respondent.

**FIELDSEND, P.:** The basic issue in this appeal is whether the respondent's infant son should continue to be a ward of court in the custody, care and control of the appellant, or whether he should be free to be taken by his mother to Morocco.

The respondent is a single (though previously married) woman, 31 years old and a devout Muslim. She has been living and working in Gibraltar for some five years. On November 24th, 1992 she gave birth to a boy. She alleged that the father was a named married Muslim but he has denied paternity. The pregnancy resulted, she said, after a single act of intercourse into which she was pressurized by the father. She concealed the pregnancy from her brother, in whose house she was living, and from her employers, and indeed she did not seem to come to terms with the fact that she was pregnant. She was taken to hospital as an emergency case very shortly before the child was born.

She was overwrought at having given birth to a child and her immediate aim was to try to conceal the fact from her relatives, particularly from her brother, and indeed from the world at large. This was because in Muslim culture it is a matter of great shame for a single woman to bear a child, particularly if it is conceived in adultery, and she was very fearful of the consequences to the father, herself and even the child. She was also concerned at the possible effect of the news on her own father. For those reasons she initially showed no interest in the child and refused to feed or care for him in any way. Her anxiety increased when the alleged father was brought to see her and, in an angry scene, denied paternity. There was evidence from two nurses and from the appellant, though denied by the respondent, that she said the man had told her to get rid of the child by killing him and disposing of the body.

The respondent sought to solve her problem by getting someone to take the child and she offered him to various people in the hospital. The appellant, a nursing sister and midwife at the hospital, hearing of this, offered to take the child. She is a single woman of 44 years, living with her sister and brother-in-law in Gibraltar, and had for many years been interested in adopting a child.

The respondent was pleased to accept this offer, as she regarded the appellant as a kind and helpful person and, on November 30th, 1992, she

signed a consent authorizing the respondent "to take full responsibility for and assume full parental rights over" the child and confirming "consent to the adoption of" the child by the appellant. The appellant then took the child home and the evidence was that the respondent's anxiety seemed to be greatly alleviated and she showed no worry or distress at the child's leaving. Her evidence was that despite the form of words she had signed, she never intended to part with the child permanently but was merely seeking a way out of her immediate difficulties.

The respondent was seen by Mr. Montegriffo and Mrs. Fa of the Social and Probation Services at the hospital on December 1st. She was visibly distressed but said she wanted the appellant to keep the child, provided that he was brought up in the Muslim faith and tradition and that she could have access to him. These conditions were agreed to by the appellant, but Mr. Montegriffo left with the impression that the respondent was still not wholly decided. Indeed, subsequent events showed that the respondent was seeking ways of taking the child to Morocco and settling matters with her family.

During the time when the boy was with the appellant it is common cause that he was well looked after and made good progress, forming an affectionate bond with the appellant. The respondent visited the child on a number of occasions but, for understandable reasons, the atmosphere on these visits was somewhat strained and artificial.

By about January 14th, 1993 the respondent had recovered from her initial shock and was coming to terms with the fact that she had a child, and was seeking ways of taking the boy to Morocco. Mrs. Fa informed the appellant through her solicitor that the respondent wanted the child back. As a result, a meeting was held on January 19th. It seems that at this meeting the respondent was told that the appellant would not return the child to her and that wardship proceedings would be instituted if necessary. Thereafter, the appellant and the respondent were left alone and the respondent orally agreed, subject to her having access, to the appellant going ahead with her adoption plans, provided that the boy was brought up as a Muslim and was given the name Hamsa—conditions agreed to by the appellant.

Again, on February 23rd, the respondent telephoned the appellant's lawyer asking for the child to be returned to her. On that day the appellant's proceedings for adoption came before the magistrates' court, but were adjourned for consideration by the Supreme Court. On March 4th these wardship proceedings were started, being finally decided on July 23rd. In the result, the child was made a ward of court, the child to be taken into care by the Social Services within seven days and so to remain until the respondent was ready to take the child to Morocco, when custody, care and control would revert to her.

From January onwards the respondent had been considering ways of overcoming her difficulties and of taking the child to Morocco. On March

12th her solicitors wrote that suitable prospective adopters had been found in Morocco and on April 14th they wrote that the respondent's sister and her husband were willing to make themselves responsible for the child and would be giving evidence in the pending proceedings.

In the proceedings, evidence was given at length by and on behalf of the appellant and the respondent. For the most part this was concerned with the relative merits of the arrangements that each could make for the upbringing of the boy. Professional evidence was called for both parties. It was not contended, however, that there was still any physical danger to the child as had been anticipated whilst the respondent was in hospital.

It was common cause that the appellant could and would provide a good home for the child. She was a caring person who had become very fond of the boy. As she apparently told Mr. Trinidad, an educational psychologist, "this little present that moved was all I could ask for," and "I felt full with a baby I could call my own." The home is entirely suitable. There were, however, some doubts in the mind of Mrs. Fa about formal approval of any adoption. There could be long-term complications for a Moroccan boy being brought up as a Muslim by a single parent in a Roman Catholic household in Gibraltar.

The arrangements for the child as set out in the affidavits of the respondent and her sister was that the boy would be taken into the sister's family as an adopted child. He would be treated as a child of the family, regarding the sister and her husband as mother and father, but the respondent would be able to see him on a regular basis. The respondent is at present engaged to be married. Her prospective husband does not know of the child and will not be told at least for some time, though the respondent hopes to be able to tell him in the future and then resume her full role as mother, possibly in four years' time. This matter of the respondent's possible change of roles emerged only in evidence and was not in the affidavits.

There was evidence of the suitability of the home and of the caring and helpful attitude of both the sister and her husband, though neither of them had seen the child. The learned judge was satisfied that the sister was a responsible and sensible lady, who could provide love and care for the child, just as he was satisfied that the appellant could do the same.

There is little, if any, dispute on the law. The parties agree that the substantial issue is the welfare of the child, and that the determination of this was a matter in the discretion of the learned judge below. It is accepted, too, that in cases of this nature the Court of Appeal will interfere with the exercise of that discretion only in limited circumstances. To succeed, an appellant must show that the judge below has applied wrong principles or failed to apply proper principles correctly. In effect, an appeal court will interfere only if satisfied that the decision is plainly wrong for either of the above reasons.

Mr. Dumas has presented a very detailed and wide-ranging attack on the judgment below. This has been considered in the judgment to be delivered by Huggins, J.A., with which I agree. Mr. Dumas's careful analysis of the facts and relevant considerations were designed to show that the learned judge failed to treat the welfare of the child as the paramount consideration. This, he says, is shown by his failure to take properly into account the adverse effects on the child of returning him to his mother, given the uncertainties and difficulties inherent in her arrangements for him in Morocco. This, he says, coupled with the respondent's apparently vacillating attitude towards the future of the child, should have given the learned judge very real fears as to the suitability of these arrangements.

On the latter aspect, Mr. Dumas contends that there was no justification for the learned judge to find as he did that the respondent never intended to part with the child permanently.

On this point it is clear that the respondent's apparent intention both on November 30th, 1992, when she signed the consent form, and at the meeting with the appellant on January 19th, 1993, was to part with the child permanently. She says, however, that on the first occasion she was desperate to find a solution to her immediate problem of keeping news of the birth from reaching her brother or other relatives. It may well be that she then saw no way of keeping her child and was willing to part with him. On the second occasion she had still been unable to make any arrangements for keeping the child herself and she said that she was afraid the appellant might not be willing to keep the child if she did not think she could have him permanently.

That she had doubts as early as December 1st, 1992 is spoken to by Mr. Montegriffo, and she expressed a change of mind on January 14th and again on February 22nd. While this may not reflect creditably on her conduct towards the appellant, it does not necessarily mean she is not to be believed when she says that, at least after December 1st, she had doubts about relinquishing the child forever. Even if the learned judge was wrong in saying that from the outset she never intended to part with her son permanently, that is not, in my view, a misdirection of any significance even though that may have been her intention on November 30th.

Mr. Triay contends that in the circumstances as they emerged at the hearing, there was no reason for making the child a ward of court, save possibly as part of the mechanics of returning the child to his mother. The situation then before the court was of an illegitimate child whose mother wished to take him to Morocco to be brought up by her sister's family, with her in close attendance. It is true that, particularly in Moroccan custom, the child was disadvantaged by being illegitimate, but that in itself was no ground for making him a ward of court. Had there been, at the time of the hearing, a fear that the child might come to harm if returned to his mother, that would have been a different matter. The

previous events may have given the appellant some fear that this might have been so and justified her instituting the proceedings, but the evidence before the court must have dispelled those fears.

I find great force in this contention. It seems to me that the appellant's case can now rest only upon establishing that it would be better for the child to remain with her on a long-term basis. The alternative of leaving the boy as a ward of court in the custody of the appellant until the respondent brings further proceedings to recover him is not, on the evidence, a viable one. The longer he stays with the appellant, the more traumatic would be any change.

Despite all the cogent criticisms of the arrangements for the child in Morocco, and with the possibility of a change in these arrangements in the future, it cannot be said that the learned judge was plainly wrong in reaching the decision to return the child to his own mother to be brought up as a Muslim in her own family in her own country. This, too, is my view on the evidence before us. If he is to be brought up as a Muslim it is better that it should be in those surroundings rather than in a Catholic family in Gibraltar. In a Muslim family he may be able to come to terms more easily with the true facts of his birth and parentage when they emerge, as one day they must.

The most worrying features of the Moroccan arrangements are the uncertainty of the timing of the respondent's marriage plans and the uncertainty as to how her future husband and the male members of her family, apart from her sister's husband, may react when they learn the facts. These, coupled with the fact that the Gibraltar court will have relinquished its jurisdiction, have to be carefully weighed, and this I have done.

This makes it unnecessary for me to consider the other detailed points made by Mr. Dumas. Assuming that a number of them have substance and, taken cumulatively, might lead to the conclusion that the learned judge may not have properly directed himself, this would mean that this court must now consider in its discretion what the decision should be.

As I have indicated, the decision arrived at was one which, on all the evidence, I would have arrived at. It is true that being illegitimate the boy will suffer some disadvantage, but one can only hope that this will be minimized by the loving care of his mother and her relatives, even though at least for a while he will be in the position of the adopted son of his aunt.

In my view the appeal must be dismissed. The child will remain a ward of court in the custody of the Bishop Healey Home, with leave to his mother to take the child to Morocco as soon as she can make the necessary arrangements. The child will cease to be a ward of court once he is taken into the home of his mother's sister in Morocco.

Whilst the child remains in the Bishop Healey Home, access arrangements may continue as at present.

**HUGGINS, J.A.:** I entirely agree with all that my Lord the President has said. Since we are satisfied that even if the judge was in error in one or more of the ways alleged when he decided how to exercise his discretion, we would have reached the same conclusion, it is not strictly necessary to consider all Mr. Dumas's submissions, but in deference to him I will explain why he has failed to persuade me that the appeal should be allowed.

It is at the forefront of the appellant's case that the judge failed to regard the welfare of the child as paramount and dealt with the matter as an adversarial proceeding. Whatever criticism may be levelled against the judge's decision, he did not err in this respect. He started his judgment by emphasizing that these were wardship proceedings, and in his final paragraph he said: "I have taken as my first consideration the paramount interest of the child."

The appellant's argument ignores the fact that wardship proceedings are necessarily brought by one party against another and that each sees the welfare of the child from a different point of view. It is true that the judge may have yet another point of view of the child's welfare (see *In re E. (S.A.) (A Minor) (Wardship: Court's Duty)* (1)), but in the present case I do not think that there was effectively "a third course of action that was available." It is questionable whether the giving of temporary custody, care and control to the Social Services was wise, but it was done, undoubtedly with three objects in mind: (a) to avoid further bonding between the child and the appellant before the child was returned to the mother; (b) to avoid any traumatic scenes between the parties at the moment of handing over; and (c) to give access to the mother without her having to go to the appellant's home. Prolonged custody by the Social Services was not a reasonable option even for the purpose of ascertaining whether the rest of the family would accept the child.

I am not sure that I would have made the temporary custody order, but I cannot say that it was wrong to do so. Even if I could, that part of the order should not now be set aside and the child returned to the appellant until such time as the mother takes him to Morocco. That would clearly be against his best interests.

If custody were given to the appellant, that would be subject to review whether the order so stated or not. In theory, the same would apply if custody were given to the mother, but once the child was removed from the jurisdiction, effective control by the court would be impossible. I see no other sensible option which was available to the judge. The fact that the judge referred to the conduct of the two parties does not indicate that he was considering their conduct other than to ascertain which of the possible options was in the best interest of the child.

Although the judge applied the correct test, we still have to inquire whether he applied that test correctly. The appellant contends that (i) the judge based his decision on findings of fact which were not justified; (ii)

he regarded matters which were irrelevant; and (iii) he disregarded or attached insufficient weight to matters which were relevant.

The judge found that, when giving the child away, the mother did not intend to lose the child permanently but that she did not so inform the appellant. There was undoubtedly evidence from which it could be inferred that she did so intend. Was there evidence from which the judge could properly infer that she did not? He did not say upon which evidence he relied. Nevertheless, he was clearly satisfied that when she offered the child for adoption, the mother was under great pressures, arising not only from the physical effects of the birth but also from the illegitimacy of the birth and her situation in Gibraltar. What, I think, was suggested on her behalf was that she was so overwhelmed by the "disaster," as she saw it, which had befallen her that her mind did not go with her actions. She was in a blind panic and would say anything to avoid or delay the consequences of what she had done. When she began to get things into proportion, she did not so much "change her mind" as apply her mind for the first time. She then knew that she was not prepared to give up the child forever.

It must be remembered that she was an unsophisticated young woman in a foreign country and that she lived with a brother of whom she was afraid. She had little or no knowledge of English and only a smattering of Spanish, and appears to have had no friends in whom she could confide. Even if she did understand what she was doing when she gave the child away, and therefore did subsequently change her mind, that is not fatal to the mother's case. It would fit in with the judge's view that she was willing to say anything to get out of her immediate difficulties and was thus not entirely honest, but the judge was still satisfied that she was not an unsuitable character to have custody of the child, so that her "change of mind" cannot invalidate the judge's assessment of the child's welfare. In my view, it was open to the judge to find that she never contemplated losing the child permanently and it cannot be said that in so finding he was manifestly wrong.

The learned judge found that the child's "own country" was Morocco and "Tangiers, the town where he belongs." It is said that as paternity had not been established, this finding was unjustified. There was no evidence as to the law of Morocco on the subject and the judge was entitled to assume that it was the same as the law of Gibraltar. Here was the illegitimate child of a Moroccan woman who intended to go to Tangiers to live and whose family members have homes there.

The child's physical appearance was as irrelevant as was the identity of the father. In my view, it was open to the judge to find that the child was of Moroccan extraction and that, although born in Gibraltar, he belonged in Tangiers.

The memorandum of appeal alleged that the judge was wrong to find that the mother was, on January 19th, 1993, unwilling to sign a consent to

adoption when none was proffered. That was a *non sequitur*, but the contention, as advanced in argument before us, was that she did not refuse to sign because the matter was not raised. The mother said in an affidavit that the matter was raised and that she was not prepared to give her consent. It may be that that unwillingness was not expressed at the meeting on that day and that there was no "refusal" to consent, but that does not invalidate the judge's decision. Nor could the other errors of fact alleged justify interfering with the decision, even if they existed.

It is complained that the judge ought not to have had regard to the reports of Mrs. Fa because they were not supported by other evidence and, in particular, by expert evidence from a psychologist. The judge was entitled to give her evidence whatever weight he thought appropriate. It is true that the first report was prepared with a view to the child's adoption, but that did not make it inadmissible. Mrs. Fa said in evidence she did not know how much of it was relevant and there is no reason to believe that the judge had regard to the parts that were not relevant.

The complaint that the judge did not have regard, or sufficient regard, to matters which were relevant seems to be based upon the general contention that his decision was unreasonable and that he must therefore have given insufficient weight to the material factors. I accept that that is a legitimate argument where the decision is unreasonable, but I am not persuaded that it was unreasonable to give custody to the mother. There were strong reasons for not doing so, but in these difficult cases there are often strong arguments on both sides.

Here, the judge appreciated that the mother herself would not, at least initially, be able to look after the child and that he might be adopted by her sister. He also mentioned the uncertainties arising from the fact that some male members of the family were being kept in ignorance of the child's illegitimacy. There was reason to believe that these last were not as great as the mother at first feared, because the brother-in-law (who knew the truth) was prepared to accept the child into his home. The judge clearly thought that the appellant had underestimated the problems of trying to bring up a Muslim child in a Christian home and gave great weight to what he called "the elements of religious upbringing and roots" and "the definite wishes of the mother." Inevitably his decision involved a risk, but I cannot say that it was unjustified, even where, if things were to go wrong, the child would no longer be within the jurisdiction of the court.

**DAVIS, J.A.** concurred.

*Appeal dismissed.*