---

http://www.incadat.com/ ref.: HC/E/UKe 18
[17/10/1996; High Court (England); First Instance]
Re H.B. (Abduction: Children's Objections) [1997] 1 FLR 392

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

17 October 1996

Hale J

In the Matter of H.B.

HALE J: This is an application under the Child Abduction and Custody Act 1985 and the Hague Convention for the return of two children to Denmark. The children are: A, who was born on 14 July 1983 and so he is 13; and C, who was born on 2 April 1985 and so she is 11. The plaintiff mother is Danish and lives in Denmark with her second husband (the children's stepfather) B and their son M who is aged 5 3/4. The defendant father is English and lives here with his second wife, the children's stepmother and her older children. The parents were married in 1982 and separated in 1989 when the mother went to stay in Denmark with the children for a trial separation. The marriage came to an end after that.

There were wardship proceedings initiated by the father which eventually resulted in orders on 23 August 1990. These were that the wardship was to continue; care and control was given to the mother until further order; on the mother's undertaking to bring the children within the jurisdiction if called upon to do so, she was given leave to continue to live with the children in Denmark; on the father's undertaking to return the children at the conclusion of access, he was given staying access for 2 weeks at Christmas or Easter in one year alternating with 2 or 3 weeks in the summer holidays in the next and visiting access in Denmark at school holiday times.

Access took place in 1991 and 1992 but in 1993 the mother stopped the summer visit because, she says, she believed that the father would not return the children. The father says that the real reason was that he had lost his job because of illness (he suffers from multiple sclerosis) and was unable to pay maintenance for the children at the same rate as before. He produces a letter from her dated 23 June 1993 to the effect that the children would not come to England unless he paid the sum of £1300 into her account. So there is some support for his account of matters. The children's last visit here, therefore, until this year, was at the end of 1992, although they were in touch with their father by telephone.

In 1994 the father took action here in an attempt to enforce the 1990 contact order. After that the parents agreed that the children should come here for a summer visit in 1995; but

again the mother stopped this, again because, she says, she overheard a conversation between the father and A which led her to believe that the father would not return the children. The father then sought help with the enforcement of his access through the Central Authorities.

The Danish authorities interviewed the mother in January 1996 and ascertained that her objections to contact were partly that she did not feel that the father was entitled to it as he did not pay enough maintenance and partly that she feared that the children would be abducted or kept by force. The children were interviewed in February 1996 and said that they wanted to visit their father, A being particularly anxious to re-establish the relationship. Later in February 1996 the parents agreed that the children should come here between 21 June and 10 August 1996.

The decision of the Danish authorities, which is dated June 1996, was that in even years they should have 3 weeks' summer holiday here (except that this year a longer period had already been agreed between the parents) and in odd years they should have the one week of the winter holiday and 2 weeks of the Christmas holiday here. It also provided that there should be telephone contact every Sunday and the exchange of correspondence as required.

In fact, A came here earlier than originally agreed, on 30 April 1996. The mother's account is that A had been a difficult child for the last year or so. In December 1994 his maternal grandfather had died and he was very upset. His behaviour deteriorated and he went to live with his maternal grandmother for a few months. The mother also says that in 1994 -- but I wonder whether she actually means 1995 -- he fell in with boys who were a bad influence on him. He was caught breaking into a house, stealing a radio and damaging car aerials and post boxes. It is not quite clear when or on how many occasions this took place. At all events, in January 1996 he was offered a place in a home for children with difficulties, a Ronnehuset, and it was agreed that he should go there. That is roughly the equivalent, it appears, of being accommodated by a local authority, although with perhaps more expectation that the children will come and go between the home and their families than there would be here. Nevertheless, the mother says that things did not improve and he would go out from the home with his friends without saying where he was going and sometimes have to be picked up by the police.

On 2 March 1996 the mother rang the father and asked how he would feel about A coming to live with him. She made it quite clear that she was talking about a matter of years rather than months but also that she was asking how he felt about this before putting it to A. The father made it clear that it was more important to sort out something stable about visits. He wanted her to put her request in writing because he was afraid of being accused of kidnapping or the like. But he also said that if A wanted to come there would be a place for him.

On 10 March 1996 there was another phone conversation in which, principally, the father was trying to establish A's whereabouts. He had earlier spoken to C and been told that A was in something called a Ronnehuset because 'Mor can't handle him'. The mother appears in this conversation to have been evasive about where A actually was and said that he was out playing. She again complains about the financial situation and emphasises that she had only been asking the question about whether A could come and live here with his father.

The mother's account is that she decided to send A here early when she learnt on 26 April 1996 from a family member that A was in possession of cannabis. She collected A from the Ronnehuset that same day. The father says that A phoned him the next day and said that he

would be arriving soon. Then the mother phoned on 29 April 1996 and gave the flight details and A arrived on 30 April 1996. The mother had bought him a one-way ticket.

A's account, as given to the court welfare officer who interviewed the children for the purpose of these proceedings, was that the mother used coming to England to live with his father as a threat in the hope of securing better behaviour from him. A's understanding, when he came, was that it was possibly until he learnt to modify his behaviour, with no set time-limit, but not that he was coming here permanently or long term to live.

C followed on 23 June 1996, 2 days later than agreed, and the father supplied a return ticket. There is no record of a previous discussion about C coming here to live and she told the court welfare officer that she did not raise the issue of doing so in case her mother would not let her come at all.

On 29 July 1996 the father informed the mother that he would not be returning the children and on 30 July 1996 he made an application for a residence order. The mother immediately consulted the Danish Central Authority on 29 July 1996 and was told that she could do nothing until after the agreed date for return. On 12 August 1996, therefore, the mother again contacted the Danish Central Authority and the processes under the Hague Convention were set in motion. The originating summons is dated 18 September 1996.

Hague Convention cases always present difficulties for the court because it is not the court's function to determine where the children's best interests lie. Their welfare is not the paramount consideration. The object of the Convention is to ensure that children are returned to the country of their habitual residence for their future to be decided by the appropriate authorities there.

The father concedes that the children's habitual residence is Denmark. The mother was undoubtedly exercising her rights of custody before the children came here and therefore their retention beyond the agreed date of return is wrongful in terms of the Convention and they should be returned unless there is a ground which will give the court a discretion not to do so and the court in the exercise of its discretion decides that they should not be returned.

Their return is resisted on three grounds in this case. First, it is argued under Art 13(a) of the Convention that the mother consented to the retention of the children here. I have already set out most of the evidence relevant to that. None of it relates to C save for a reference in the father's second affidavit to his telling the mother on the telephone that this would be a one-way trip. There is no independent evidence to support that and in any event it would not be enough to amount to the mother's consent to that declaration of intent. There is nothing in the evidence to cast real doubt on the agreed position as set out in the decision of the Danish authorities in relation to C.

It is much more difficult with A. The Danish decision was based on an agreement reached in February 1996 before the telephone conversations which I have described and the abrupt decision to send him here early. The phone conversations were taped and the transcriptions have not been challenged. They are highly suggestive of a mother in a real quandary about what to do for the best and sending the child here in the hope that it would bring about an improvement. It may indeed have been an open-ended idea at that point, but certainly there was no clear consent from the mother that A should stay here permanently. It is interesting that the father himself does not suggest that in his first affidavit when he was acting in person. It may be that he did not understand the relevant law but it may also be that that was not how he saw things. It seems likely that all saw it as a potentially open-ended arrangement but not a permanent one.

The legal position remains that the mother is the person with whom the children are to live, subject to contact with the father as determined by the court of habitual residence in the decision promulgated in June 1996. The mother was therefore entitled to insist on A being returned in accordance with that decision and her actions have made it clear that that is what she is doing. There is no suggestion of subsequent acquiescence by the mother in the children's retention. I hold, therefore, that the mother has not consented to the retention of either child beyond 10 August 1996.

Secondly, it is argued that under Art 13(b) there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It is recognised that defences under this article and paragraph carry a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm. Otherwise there is the risk that the courts in the country to which the children are abducted or in which they are wrongfully retained will be tempted to try the custody or other dispute between the parents.

The father refers in his first affidavit to a catalogue of physical and mental abuse he has heard from the children, but no particulars are given. The children themselves give no hint of this in their first letters to their mother saying that they do not want to return. C simply says that it is because of their stepfather. They later consulted a solicitor, Mr Robertson, who says in his affidavit that:

'They were both particularly incensed at the treatment they had received at the hands of their mother's new husband. A in particular described having been beaten and kicked by his stepfather and described other acts of ill-treatment. C corroborated these statements and said that although A was the butt of their stepfather's treatment, he had at times been very cruel to her.'

A letter from their English school says that C described to teachers an incident in which her stepfather hit her in the presence of a friend. In their interview with the court welfare officer, both children were very critical of their stepfather. They described an incident where he had kicked A, bruising him so severely that he could not go swimming. There were no such allegations in respect of C, although she did talk of some rough handling. It was also said that the mother would smack A and hit him very hard, although C said that this had diminished quite a lot recently. The worst example given was when she had hit him with three plastic spoons which had broken and the mother had then sat down and cried. The overall impression given to the court welfare officer is of children who do not have at all an easy relationship with their stepfather and resent their mother's attempts to treat all three of the children as his, thus denying their relationship with their real father. But both love their mother and wanted her to know that.

However, there is also a troubled relationship between A and his mother at the moment. He acknowledged to the court welfare officer that he was behaving badly and provocatively, but said that she was not handling him properly. His teenage problems are made worse by the fact that he is very short and looks very young for his age. So it is difficult for others, including, it appears, his mother, to respond appropriately to him.

The court welfare officer also said that they were lively children. They did not seem to her to be very troubled or burdened children. They described their stepfather to almost comic effect to her. She did not get any sense of children in danger, just a certain amount of dread and pessimism about the future if they were returned to their mother's care.

This adds up to some difficult relationships, some insensitivity on the part of the mother and the stepfather, and from time to time some inappropriate chastisement. But it does not add

up to deliberate ill-treatment or abuse such as would expose either of the children to a grave risk of physical or even psychological harm. Any risk of psychological harm or being placed in an intolerable situation is, as a matter of fact in this case, more closely connected to the children's objections to return, to which I shall now turn.

The third defence is also provided under Art 13 which states:

'. . . the judicial or administrative 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.'

The leading case is Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492, a decision of the Court of Appeal. The main points in that decision are first that this part of Art 13 is quite separate from Art 13(b) and does not therefore depend on there being a grave risk of physical or psychological harm or the children being placed in an intolerable situation if their views are not respected; and, secondly, that the words are to be read literally without any additional gloss, such as the suggestion made in an earlier case of Re R (A Minor: Abduction) [1992] 1 FLR 105, that an objection imports a strength of feeling going far beyond the usual ascertainment of the wishes of a child in a custody dispute.

The first question is therefore whether the children object. The evidence of the court welfare officer is quite clear. They both made very dramatic objection to returning. They said such things as that the plane would explode because of their powerful feelings of objection. A also said that he would kill his stepfather if returned. I did not, however, understand from her evidence that either of them would physically resist if told that they had to go. Nevertheless, it is clear that they object.

The second question, therefore, is whether they are of an age and maturity at which it is appropriate to take account of their views. In the case of Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716, the Court of Appeal rejected the suggestion that there is a halfway house: either a child is old enough to have his views taken into account or he is not. This was in the context of a case where the court had said that the child was too young to do so but had nevertheless purported to exercise a discretion not to return.

It would be difficult indeed to suggest that a 13-year-old of normal intelligence and maturity should not have his views taken into account. The court welfare officer thought that, despite his youthful appearance, A's intellectual and emotional development were appropriate for his age. An 11-year-old is a more borderline case, and the court welfare officer thought that C's demeanour was slightly younger than her real age: she was more frank and giggly in her exchanges. But Mr Robertson, the solicitor, who is an experienced solicitor in the representation of children and saw the children because they both wanted to be joined as parties to these proceedings, formed the view that they were able to give him instructions.

I conclude therefore that these children are both of an age and maturity in which their views should be taken into account. But taking their views into account does not determine the matter. In Re S at 252A and 501D respectively Balcombe LJ pointed out:

'. . . if the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention.'

I have to consider whether the children's views are unduly influenced by the father, whether consciously or unconsciously. There is always a risk of what counsel for the mother has described as 'place-dependent views', just as there is sometimes a risk of 'grass is greener' views, especially in adolescence.

The evidence here is not of a father who flouts court orders. The children were returned after their previous visits. The father used proper channels in an attempt to enforce the 1990 access orders, both here and in Denmark. The telephone conversation in March 1996 suggests that he was much more interested in establishing regular contact with the children and their visiting him here than in either of them coming here to live. Once they were here the evidence is consistent with a father who gave the children considerable breathing space and then took steps to draw the children's wishes to the attention of the mother and the English courts. It is rare for children to go so far as to consult a solicitor with a view to participating in these proceedings, and the children assured the court welfare officer that the father would not stand in the way of their going back if they wanted to do so. So the evidence suggests that the children's views are sincerely held and are not the result of pressure from their father.

Secondly, the children's views were expressed to the court welfare officer in terms of objections to returning to Denmark rather than in terms of wanting to stay here with their father and stepmother. It may be that the visit to Mr Robertson had given them some idea of how their views should best be put, because the court welfare officer was impressed with the extent to which they wished to put things in their way rather than to explore matters in the way that she wished to do so.

Are the objections that they voice valid ones? It is easy to suggest that this is normal teenage rebelliousness. A himself acknowledges that he has a short temper. A's reasons, however, sound a little more thoughtful than that. It is clear from the mother's own case that she is having serious trouble with him. He is getting into bad ways and bad company, whether at home or in the children's home. A admits to his own provocative behaviour, to which his mother respond in ways which, to his mind, only make matters worse. If he goes back to Denmark he fears that the same thing will happen again and that it is inevitable that he will go into the children's home either soon or even straightaway. He contrasts that with the calmer and more thoughtful response that he gets to his provocative behaviour from his stepmother. He appears to be learning that if he wants his views respected he must respect the views of others. Of course, it is not necessarily a constructive thing to do, to let him have his own way, unless there is reason to believe that he is right in this.

C is a different case. She has voiced a strong dislike of her stepfather but not alleged anything too serious against him. She thinks that she may run into the same difficulties as A in due course but is not doing so yet. It is more concerning that the mother had, in her view, painted an unfavourable picture of her father that she now knows is not right. This has affected her view of her mother.

Those are the children's objections and the reasons for them. They have to be weighed against the whole policy of the Convention which is that children should be returned, as I say, to have their future decided in the country of their habitual residence. I do not think that the fact that the English court technically preserve the wardship jurisdiction over them affects that. The standard basis of jurisdiction over the upbringing of children is the country of their habitual residence.

The policy of the Convention is, in my view, particularly important in cases where children come to another country for visits. It is obviously in the best interests of children whose

parents live in separate countries that the parent with whom they live should feel able to send them on visits secure in the knowledge that the children will be returned at the end without difficulty. Otherwise parents may be tempted not to allow the children to come, and that will be detrimental to the children.

In the case of C I do not think that the real strength of her objections, the reasons for them and the evidence of relationships at home are enough to set against that policy. Furthermore, there is no question in my mind that C's visit was always intended as a short-term holiday visit.

The case of A is more difficult. He is older, he is more mature, he has stronger and, to my mind, quite rational objections. The evidence is that the mother herself is in doubt about what to do for the best.

So what about treating the two children separately? Mr McDowall, on behalf of the father, argues that if C is ordered to return but A is not, C will suffer psychological harm from being separated from her brother. Their relationship was described by the court welfare officer as 'significant, intimate, relaxed'.

He argues that C might feel herself singled out for what she saw as punishment in going back. He draws attention to the case of B v K (Child Abduction) [1993] 1 FCR 382, in which Johnson J took account of the refusal of children aged 9 and 7 to return and then found that a younger child (whose age is not revealed in the law report) would be devastated if returned when they were not, one reason for this no doubt being that their primary carer (the mother) could not be in two places at once. In this case I do not think that that will be sufficient to amount to a grave risk of psychological harm or will otherwise place C in an intolerable situation. She would be going back to a primary carer whom she loves.

More to the point, therefore, is the conclusion that there is no good ground to refuse to return C a further reason for returning A as well? I have found this a very difficult decision, but I have reluctantly come to the conclusion that it is and that A should also be returned. His welfare is not paramount, but it is undoubtedly relevant to the exercise of this discretion. It is not usually advisable to separate siblings who are close in age and obviously allied with one another. Whether A sees it as a punishment or a reward, singling him out for different treatment from his sister and from what is asked of other children in this situation, does not seem an appropriate response to the problems he is presenting.

I conclude, therefore, that both children should be returned. Having said that, I wish to make two comments. First, I recognise that it is a strong thing to order return in the face of such strong objections from a child of A's age, and in doing so others may think that I have been too heavily influenced by an attempt to treat these children alike. Secondly, I urge that both the mother and the Danish authorities should give very careful consideration to the difficult position in which the father and the children, especially A, find themselves. It may well be in A's best interests to come here for a while. It is certainly in the interests of both children to visit here regularly.

There is indeed evidence, as I have pointed out, that the father is sincere and well meaning. It is very difficult for the absent parent in a situation like this to bring about change in the children's living arrangements, even if there are good reasons to do so. There is also evidence that the mother is rather more concerned with money than with retention of the children. Perhaps this decision will help restore her faith and enable her to ensure that the children enjoy a proper relationship with their father in future.

For those reasons the application succeeds.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law