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[11/11/1994; High Court (England); First Instance]
Re K. (Abduction: Child's Objections) [1995] 1 FLR 977, [1995] Fam Law 468

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

11 November 1994

Wall J

In the Matter of K.

Katharine Davidson for the father

Brian Leech for the mother

WALL J: I have before me what is on the face of it a straightforward application under Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 as incorporated into English law by the Child Abduction and Custody Act 1985 for the return of two small children, P and C, to the State of New York.

The mother, who is the respondent to the application, does not dispute that in the circumstances which I shall relate in a moment the children have been wrongfully retained in England under Art 3 of the Convention. She seeks, however, to escape the mandatory effects of Art 12 by relying on Art 13. Although the provisions are well known, I will none the less read them. Article 3 provides that:

'The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'

Article 12 provides that:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from

the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.'

Neither of the latter two subparagraphs of Art 12 applies in the instant case. Article 13 I will read again in its entirety:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authority shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

The mother puts her case in the following way. First, the father, she says, has acquiesced in the unlawful retention, both actively by writing letters to her and passively by failing timeously to take proceedings under the Convention. Secondly, she alleges that under Art 13 (b) on the facts disclosed in the affidavits there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation. And thirdly, she argues that P objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views.

As a preliminary point Mr Leech invited me to hear oral evidence and if need be to adjourn to enable the father to attend to give evidence and be cross-examined. I refused that application for reasons which I will give once I have recited the essential facts.

The father is an American national and the mother is English. They married in Birmingham in England on 18 June 1986, having met in 1984 in England when the father was in the US army and stationed in England. Immediately after the marriage the parties travelled to the USA where they have effectively lived ever since. The father was initially stationed at Fort Bragg in North Carolina and the eldest child, P, was born in the USA on 30 March 1987. She is thus 7 years and nearly 8 months old.

In July 1987, that is, shortly after P's birth, the father left the army and the family moved to Dunkirk in New York State, his home town where his parents lived. He says he was unable to find employment until January 1988 and certainly he appears to have had problems with employment during the course of the marriage. C was born on 25 February 1991 and she is therefore now 3.

There had been one visit to England in 1988 to see the mother's family but the father says that it was in June 1993 that the mother said she wished to visit England and in due course arrangements were made for her to have what was on the face of it a holiday in England with the children. On 22 February 1994 the mother travelled to England with the two children and she was due to return on 8 March 1994. Return tickets had been purchased.

The father says that after her voyage to England he had difficulty in communicating with the mother and eventually on 1 March 1994 she telephoned him to tell him that she was not coming back to the USA, that she had never had any intention of returning and that she wished to have a divorce. The father says he asked her to return as planned and to attend marriage counselling but that she refused to do so. There then followed an exchange of correspondence between the parties. Of that correspondence I have the father's letters; I do not have letters which he says the mother wrote to him with the exception of one letter written in October 1994. In these circumstances it is, as I have already indicated, accepted by the mother that the retention of the children in England after 8 March 1994 is wrongful within the terms of the Convention.

I will shortly deal with the circumstances in which the father came to make his application under the Convention since it is relevant to a submission which Mr Leech makes in relation to acquiescence. In answer to the originating summons the mother has sworn two affidavits, the first of which deals with her version of the history of the marriage. Her response to the application is a lengthy and detailed complaint about the father's behaviour to her and to the children during the course of the marriage, behaviour which she says began on the day of the wedding itself.

She gives detail in that affidavit of a number of assaults by the father on both her and on the children, including the father allegedly pushing her down a flight of concrete stairs prior to the birth I think of P, and also other incidents including an assertion that on at least one occasion (and I think two) he handcuffed her to the bed and effectively imprisoned her in the matrimonial home.

She also in that affidavit, beginning at para 8, gives a number of examples of assaults on the children beginning so far as P is concerned when she was some 6 months old, when she alleges that the father began to hit P with a leather belt. She also refers to an incident approximately 2 years ago when she alleges that the father lifted P by her jumper and threw her with such force against the wall that the plaster cracked.

She concludes that affidavit by asserting that the children were happy in the UK and doing well; that when P recalled her life in the USA she became quiet, staring into space, and she refers to and subsequently exhibits drawings allegedly made by P depicting assaults on her by the father. She asserts that the family is now living in a loving and caring environment surrounded by members of her family and she urges the court that it is in her children's interests both mentally and physically that they continue to reside with her in the UK. She therefore invites the court not to order their return. Although this affidavit does not specifically say so, I read it as a series of allegations in support of a defence under Art 13(b).

In her second affidavit the mother broadens the scope of her case. She first of all details other allegations of assault which she says that she had omitted from her previous affidavit,

having remembered them since and she also refers to the plaintiff threatening her with a double-barrelled shotgun. She says he continually threatened her by saying that if she or the children left he would hunt them down and kill them. She also in that affidavit raises the question of acquiescence in these terms:

'The plaintiff has been aware since March 1994 that I have no intention of returning. He has been aware in general terms of his rights since March 1994 when he sought legal advice and proposed a reconciliation agreement. If the plaintiff is concerned, as he makes out, for the children then I cannot see why he did not commence proceedings earlier. He waited some 7 months before making an application for the return of the children.'

That paragraph I take to be an argument in support of a defence under Art 13(a). Her defence under Art 13(b) is specified in this way in para 17:

'I further believe that there is a great risk that the children's return would cause the children extreme psychological and physical harm and place the children in an intolerable situation. P has been severely affected by the plaintiff's behaviour and actions. Her drawings depict our lives in the USA.'

And she exhibits the drawings by P showing herself being thrown down the stairs, being beaten by the plaintiff and, she says, more disturbingly, depicting P being beaten with a leather belt. P is aware, she says, of the present proceedings and is terrified that she will be returned to the USA.

When the case was called on, the latter assertion, P's fear that she would be returned to the USA, formed the basis of an argument raised by Mr Leech under the latter part of Art 13 and I was invited to investigate P's age and maturity and her objections. This I did.

The father in the affidavits which he has filed categorically denies all the allegations made against him by the mother and makes cross-allegations against her both as to violence to himself and in relation to the children. It is clear that there is no admission of any kind of the allegations made by the mother and therefore I am faced on the face of the evidence with conflicting statements of fact which are irreconcilable. There is other material available to me but none of it goes to the issues of fact. I have statements from the father's lawyer in the USA and, as I say, I have the correspondence between the parties; I also have an agreement which the father drew up for the mother to sign and which he sent to her and to which once again I will make reference in due course. I do not, however, have any medical evidence in relation to P and there is no corroboration of the mother's assertion of violence or, for that matter, of the father's denial.

In these circumstances Mr Leech submitted that I should hear oral evidence in order to make findings of fact which would substantiate the basis for the exercise of a discretion under Art 13(b). Mr Leech argued that on the documents I was faced with irreconcilable issues of fact which could only be resolved by oral evidence and that in order to deal properly with the Art 13(b) defence those issues had to be resolved. It was therefore necessary, he submitted, for me to hear his client and if need be to adjourn in order to give the father the opportunity, should he wish to avail himself of it, to attend to give oral evidence himself.

In my judgment Mr Leech's submissions on these points are unsound. First, the procedure under the Convention is summary. The question is whether the children should be returned under Art 12 or whether discretion should be exercised under Art 13. To hear oral evidence on disputed issues of fact would defeat the essential purpose of the Convention which pursuant to Art 1 is to secure the prompt return of children wrongfully removed to or

retained in any Contracting State and to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States.

Moreover, in practice the effect of giving Mr Leech leave to call his client would on the facts of this and, I imagine, the majority of cases result in oral evidence from one side only, and for the mother to repeat in the witness-box the assertions which she makes in her affidavit would not in my judgment advance the case in any material respect. Further, it is not in my judgment necessary for there to be specific findings of fact on contested issues for a defence under Art 13(b) to succeed. The court under Art 13(b) is assessing risk, not resolving issues of fact, and indeed it may be inappropriate for this court to make findings of fact if the factual issues are to be litigated elsewhere.

The leading authority on this point is Re F (A Minor) (Child Abduction) [1992] 1 FLR 548 where Johnson J at first instance had not heard oral evidence on a factual issue of habitual residence which went to the question of the court's jurisdiction notwithstanding that both parties were present and in court and thus available to give evidence to him. In the course of her judgment, dismissing the appeal, Butler-Sloss LJ said this (at p 552):

'. . . [counsel] submits that in a case under the Convention, where the issue is where the child was habitually resident and there is a conflict of evidence on the issue which goes to the jurisdiction of the court, the judge ought to hear oral evidence to resolve the matters in dispute and, consequently, Johnson J erred in not hearing the parties give oral evidence.

Proceedings under the Convention are summary in nature and designed to provide a speedy resolution of disputes over children and secure the prompt return of children wrongfully removed from the country of their habitual residence. The procedure set out in Ord 90, rr 32-47 is by originating summons. The parties may file affidavit evidence, but there is no right to give oral evidence although the court has a discretion to admit it (see Re E (A Minor) (Abduction) [1989] 1 FLR 135). In a number of cases, oral evidence has been admitted and, in others, refused by the judge in Convention cases which have been reported and which were brought to our attention. There is a real danger that if oral evidence is generally admitted in Convention cases, it would become impossible for them to be dealt with expeditiously and the purpose of the Convention might be frustrated.'

Later in the same judgment she says this (at p 553F):

'. . . the admission of oral evidence in Convention cases should be allowed sparingly.

If the judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case.'

I approach the questions in this case on the basis of that passage. As I have already stated, findings of fact on the disputed allegations between the mother and the father are not in my judgment crucial to my decision and I am satisfied, for the reasons that I have given, that it would be inappropriate in this case to hear oral evidence. I accordingly refused Mr Leech's application to call his client.

I now turn to deal with the three bases upon which Mr Leech sought to bring the case within Art 13. I will deal first with acquiescence.

Mr Leech asserts both active and passive acquiescence. For active acquiescence he relies on the series of letters written by the father to the mother in which the former expresses his distress at the latter's decision to remain in England and urges her to return and to consider a reconciliation. At various points in the letters the father acknowledges his responsibility for defects in his previous conduct, which does not, incidentally, include any admission of violence, and he proposes reform. He also promises that if she returns and the reconciliation does not work he will then send her and the children back to England.

As Mr Leech relied on the letters as demonstrating acquiescence I think I need to read certain passages from them, although since they are all effectively on the same theme I do not think I need to read them all. In the first letter in the bundle, which was written on 1 March 1994, the father promises reform in a number of particular respects including an assertion that he will not drink (I interpolate, once again an allegation not made against him by the mother); secondly, that he will not go out unless previously discussed and planned; and thirdly that he will not force himself sexually upon her. He continues:

'I solemnly promise that I will send you and the kids back to England if our trial reconciliation does not work.'

In that letter he expresses the intention of binding himself to a legal reconciliation document the breach of the terms of which would legally bind him to send the mother and the children back to England and grant her an unconditional divorce. That letter concludes:

'If you won't come back then I'll try to understand. If so could you at least give me an idea of when we could try to work things out together to be a family again? That's all I'll ever want from life.'

As I have already indicated, the remaining letters are very much along the same lines. In each of them the father expresses a wish for a reconciliation and urges upon his wife the fact that he will reform. He refers in one letter, written on 20 March 1994, to the prospect of the mother using the airline tickets which she already had to gain a return flight. He says this:

'I've been told that your flight was bad because of the weather. I've also been told that if you speak to the airline in England and claim an illness in the family you can get return flights for a hundred dollars each. I think I can get help to fly you here if the forthcoming agreement is acceptable.'

That again is a reference to the document which I will refer to in a moment.

A letter written on 11 April 1994 sets out in some detail the proposals which the father makes for his own reformation and the reuniting of the family and the process culminates, as I have already indicated, with a draft contract which was sent to the mother which is dated by the father, or appears to be dated by him, 21 March 1994. It does not seem to me that I need to read the whole of that document. It is perhaps significant that the mother is referred to as 'temporarily residing' in Birmingham in England and the preamble concludes that:

'The parties desire in and by this agreement to settle their differences and to become reconciled and to provide for the withdrawal or discontinuance of the action of divorce to the end that the first party [that is, the father] and the second party [that is, the wife] may resume their former relations as husband and wife all the more particularly as set out as below.'

There then follow a detailed series of provisions including arrangements for the matrimonial home and for the divorce proceedings. They include the proposition that the mother will attend a minimum of 52 sessions of marriage counselling with the father, such counselling sessions to be mutually agreed by both parties, and it concludes that:

'In the event of the agreed counselling sessions on relations according to this agreement being fulfilled should the wife wish to end relations as husband and wife the father will provide adequate passage to England within 90 days of such a decision.'

It is quite plain that this agreement and the entire tenor of the correspondence is designed to achieve a reconciliation in the USA.

The second point which Mr Leech takes on acquiescence which is passive acquiescence is that notwithstanding his initiation of divorce proceedings in New York, to which I shall refer later, in which the father sought a custody order relating to the children the father did not institute proceedings under the Convention until October 1994, some 6 or 7 months after the wrongful retention. By his inactivity, submits Mr Leech, the father has acquiesced in the retention.

In order to preserve a right to apply under the Convention the application, says Mr Leech, must be made promptly and in this context Mr Leech relies upon dicta of Butler-Sloss LJ in the case of Re F to which reference has already been made. The passage in question is at p 556 when Butler-Sloss LJ cites a passage from a previous case called Re P (GE) (An Infant) [1965] Ch 568 where (at p 585) the then Master of the Rolls, Lord Denning, referred to changes of ordinary residence and acquiescence in changes of ordinary residence in these terms:

'It will not be changed until the parent who is left at home, childless, acquiesces in the change, or delays so long in bringing proceedings that he or she must be taken to acquiesce. Six months' delay would, I should have thought, go far to show acquiescence. Even 3 months might in some circumstances. But not less.'

The locus classicus for the definition of 'acquiescence' under the Convention is the judgment of Stuart-Smith LJ in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106 at p 119, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 26. Stuart-Smith LJ said this:

'Acquiescence means acceptance, and it may be either active or passive.

If it is active, it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights and consistent only with an acceptance of the status quo. If it is passive, it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such inactivity whether the aggrieved party had accepted or acquiesced in the removal or retention.

A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the courts will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice.

If the acceptance is active, it must be in clear and unequivocal words or conduct and the other party must believe that there has been an acceptance.'

That definition has now been supplemented by the further decision of the Court of Appeal in the case of Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 of which it is I think sufficient for me to read only the headnote. It is in the following terms:

'. . . in order to determine the issue of acquiescence, the central question was whether the aggrieved parent had conducted himself in a way inconsistent with his later seeking a summary return, that consideration to be undertaken by looking at all the circumstances. Acquiescence was primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent, but the element of subjective analysis was not wholly to be excluded. There were bound to be cases where it was proper for the court to embark, with suitable caution, on an inquiry into subjective elements known only to the aggrieved parent. The judge had applied the right test and had been fully justified in having regard to the erroneous advice given to the father concerning his rights under the Convention as a circumstance relevant to the question whether or not he had acquiesced in the wrongful removal.'

I feel bound to say that despite Mr Leech's sustained argument to the contrary the suggestion here that the father has acquiesced in the retention of his children in England is, in my judgment, untenable. The whole tenor of the correspondence contradicts the concept of acquiescence. The father is not saying that because of his behaviour he accepts that the mother and the children can stay in England. What he is saying is that whilst he may have given the mother cause not to return by his behaviour he is sorry for it and will mend his ways in order to persuade her and the children to return. It is only if reconciliation in the USA fails that he will agree to her return to England with the children.

As Miss Davidson submits, there is a vast difference between accepting a degree of blame for the breakdown of the marriage and acquiescing in the retention of the children abroad. In my judgment the father at no stage does the latter. There is on the evidence simply no acceptance of the retention of the children in England, indeed the evidence is all the other way.

It is true that the father did not institute proceedings under the Convention timeously in the sense of starting them immediately he discovered the children had gone. His explanation was initially conveyed to me by Miss Davidson on instructions and now forms the subject of an affidavit sworn by the father on 10 November 1994 and appearing before me this morning by fax. He states in that affidavit that he consulted a lawyer in March 1994 and retained her as his attorney on 5 April 1994. His intention in retaining a lawyer he says was to get his children back. He was advised that in order to proceed through the Hague Convention he first needed an order for custody in the USA. That advice was plainly erroneous. He says he later found out that the attorney had attempted to obtain the order but failed to do so properly. He says that some time thereafter when he felt he was getting nowhere he mentioned it to his attorney and her response was to ask for more money. He says those fees were paid on 8 June 1994.

He then says that on 11 July 1994 he received a letter together with the returned cheque from the attorney stating that she was too busy to handle the case. He was shocked and therefore sought different advice. The new lawyer instructed on his behalf started divorce proceedings on 28 July 1994 in the local county court and began thereafter proceedings under the Convention. The father therefore relies on the erroneous advice which he received and an absence of any intention to acquiesce in the proceedings.

In my judgment the father on the facts of this case does not need that explanation. To constitute acquiescence, inactivity must be evidence of a state of mind. Here all the evidence of the father's state of mind points away from an acceptance of the retention of the children. In my judgment the mere fact that he did not apply under the Convention for 6 months cannot on the facts of this case constitute acquiescence under Art 13(a) and the observations of Lord Denning MR as cited by Butler-Sloss LJ are not in point.

The father's conduct in seeking the custody of his children in the USA and at the same time seeking a reconciliation with his wife on the basis that she returned to the USA is not in my judgment conduct inconsistent with the summary return of the children to the place of their habitual residence. I therefore have no hesitation in rejecting Mr Leech's submissions based on Art 13(a). If I am wrong on my general observations on acquiescence then the father's affidavit in my judgment justifies the delay which occurred.

I turn now to the defence under Art 13(b). The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction. However, to come within Art 13(b) there has to be a grave risk of substantial harm to the children. Furthermore, and crucially in this context, the court is entitled to have regard to the practical consequences of its own order and accordingly any risk of harm can properly be reduced or in some cases extinguished by undertakings or by reliance on court procedures in the Convention State. In B v B (Child Abduction: Custody Rights) [1993] Fam 32 at p 40, [1993] 1 FLR 238 at p 245, Sir Stephen Brown P cites a passage from the judgment of the Master of the Rolls in a case called Re C (A Minor) (Abduction) [1989] 1 FLR 403 in which Lord Donaldson says this (at p 413):

'We have also had to consider Art 13, with its reference to "psychological harm". I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that it will be done. Save in an exceptional case our concern, that is the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child.'

Observations to a similar effect are to be found in the judgment of Waite J, as he then was, in the case of P v P (Minors) (Child Abduction) [1992] 1 FLR 155 at p 161. Dealing with a mother's arguments under Art 13(b) the judge said:

'Arguments [of the kind raised by the mother as to her own state and the knock-on effect which it would have on the children] are commonly raised within this jurisdiction. They are really, however, beside the point. That is not because the jurisdiction is inhumane. On the contrary, there is a humane purpose underlying it in ensuring that children are not subjected to disruption through arbitrary movement by one parent or the other. The reason why evidence of that kind is beside the point at this stage is the underlying assumption of the Convention which I have already mentioned, that the courts of all its signatories are equally concerned to ensure, and equally capable of ensuring, that both parties receive a fair

hearing, and that all issues of child welfare receive a skilled, thorough and humane evaluation.'

It follows, in my judgment, that even if the mother in this case were able to establish on the facts that the father has been violent to her and to the children in the past it would still be open to the father to argue that the children should none the less be returned because the situation to which they are returning was not one in which there was any danger of physical or psychological harm and because the children were to continue to live with their mother until such time as the matter had been ventilated before the American court. Given the protection afforded to the mother and the children by the American court the risk of physical harm on this argument effectively disappears. Any psychological harm to the children would depend on the psychological effect on them of a return in their mother's care to an establishment in the USA where their parents were not living together and from which their father was absent.

On this analysis the mother's case in my judgment comes nowhere near to establishing a case under Art 13(b). There is, first, the evidential difficulty that the facts are all in issue and that there is no corroboration of her assertions. What one has in my judgment, therefore, is a regrettably not unusual marital conflict in which cross-allegations of assault are made. Secondly, however, there is no evidence apart from the mother's statement that the children are frightened of their father and that to return them to the USA and their mother's care would run the risk of grave psychological harm.

In this context I do not regard the welfare officer's interview with P as advancing the mother's case under Art 13(b). As Miss Davidson submits, the USA has a highly developed, highly sophisticated legal system which is more than capable of dealing with issues of (a) domestic violence, whether against the mother or the children, (b) custody, and (c) maintenance.

In this context the father, in his latest affidavit produced this morning, makes the following statement:

'My attorney has informed me that the custody issues together with support and domestic violence issues may be brought to the court as soon as 9 days after the children are brought back to the USA. Your affiant [that is, the father] also pledges to make available to the defendant and the children the marital residence flat for 30 days after she has returned to the USA with the children or at the defendant's option to provide motel accommodations for the defendant and the children for 30 days after she has returned at my cost in the Dunkirk area approximately 3 miles from the marital residence flat.'

He goes on:

'I hereby pledge to the English court that I will not oppose a request on the defendant's behalf for an order of protection made against me without prejudice. My acceptance of the order of protection is conditional upon the acceptance not being deemed an admission to any of the allegations purported by the defendant. I make this offer only to assuage the English court and not to be deemed in any fashion or manner as admissions to the allegations of violence that the defendant has levelled against me.'

In other words, the framework being put forward by the father is a system designed to protect the mother and the children until such time as the matter can be properly before the American court. I can in my judgment look to the American court to protect the children, therefore, from both physical and psychological harm.

Miss Davidson also made a number of factual submissions on the mother's evidence designed to attack its credibility. Whilst it is on the face of it curious that the father's admissions, particularly that he drank to excess on occasion, bear no resemblance to the mother's complaints and that the one letter from her that is in evidence makes no mention of physical violence, it does not seem to me appropriate on the facts of this case to go into those issues. There is plainly no corroboration either way and everything each party says is effectively in issue. Despite this, the mother in my judgment could mount an Art 13(b) defence if she were able to satisfy me that notwithstanding contested issues of fact the underlying factual substratum of the case was so serious that it ran the risk of exposing the children to physical injury or serious psychological harm in the USA. That, in my judgment, the facts of this case come nowhere near doing.

Therefore, looking at the matter from the mother's point of view, even if I were to be of the opinion that on the totality of the evidence available to me there was an objective basis for her anxieties about physical and psychological harm and that her evidence on the questions was credible I would still have to decide whether or not the risks of physical or psychological harm involved were grave and I would, in my judgment, be compelled on the evidence to hold that they were not. In these circumstances the Art 13(b) defence also in my judgment fails.

P's objection to being returned

I have found this the most difficult part of the case. I will repeat Art 13 in this respect:

'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.'

It is clear from the case of Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242 at p 250, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at p 499 that this part of Art 13 is separate and distinct from Art 13(b). I quote from the judgment of Balcombe LJ:

'It will be seen that the part of Art 13 which relates to the child's objections to being returned is completely separate from para (b), and we can see no reason to interpret this part of the Article, as we were invited to do by [counsel], as importing a requirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation. Further, there is no warrant for importing such a gloss on the words of Art 13, as did Bracewell J in Re R (A Minor: Abduction) [1992] 1 FLR 105 at pp 107-108:

"The wording of the Article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Balcombe LJ comments:

'Unfortunately Bracewell J was not referred to the earlier decision of Sir Stephen Brown P, in Re M (Minors) (unreported) 25 July 1990, in which he rightly considered this part of Art 13 by reference to its literal words and without giving them any such additional gloss, as did Bracewell J in Re R.

As was also made clear by the President in Re M (above), the return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live: see, in particular, Art 19. There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances. Thus, to take the circumstances of the present case, it may be that [the child] would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Art 12.'

P is 7. In her first affidavit the mother says she, P, is petrified of the father. She does not, however, rely in that affidavit on P's objection to being returned. In her second affidavit, as I have already recited, the mother exhibits drawings said to be made by P and asserts P is aware of the present proceedings and is terrified that she will be returned to the USA.

At the outset of the current hearing Mr Leech invited me to investigate P's objection. I clearly had a discretion whether or not I should do so (see the decision of Waite J, as he then was, in P v P (Minors) (Child Abduction) [1992] 1 FLR 155). Although I regard 7 as being on the borderline for the purposes of this part of Art 13, I invited the duty court welfare officer, Mr Maines, to see P immediately. This he did, having first of all read all the background material. Having seen P, Mr Maines reported to me in the following terms:

'I have spoken to P. I was with her for half an hour. She is 71/2. I have studied the background material. P struck me as a rather sad little girl. She was not morose or colourless but she had had rather a long and bewildering day. As to matters at home, she said her home in New York was quite big. Her present home was rather smaller. I have to say that allowing for the situation in which she found herself she was not very forthcoming. She has recounted to me incidents from her recollection, mentioning specifically being struck with a buckle or belt and being smacked at times. She thought it was unfair because she had not been naughty all the time. Mention was made of a "double-barrelled shotgun" and being able to smell drink. Of her present situation she has said to me that she wants nothing more to do with her father and when asked what the position would be if she were to return to the USA she said, "I would be afraid to go back. It would be the same". I think I can say she is of normal health and development and as regards her maturity that corresponds to her chronological age. Her account was given to me from her standpoint and other people only mentioned when I raised points.'

He was then cross-examined by Mr Leech and in answer to Mr Leech he said:

'As to her memory, she described the double-barrelled shotgun and her father saying, "If anyone runs away from me I will hunt them". There was the throwing down the stairs incident. She did not elaborate. I did not feel it proper to press her.'

He was then cross-examined by Miss Davidson for the father and he said:

'She was prepared to admit that she was naughty sometimes but she was conveying to me that being smacked as much as she was was not just. She was not particularly forthcoming.'

It would appear from this evidence, as Mr Maines says, that P's age and degree of maturity are consistent with her chronological age and that she objects to being returned. Neither proposition, however, resolves my dilemma: is she of an age and degree of maturity at which it is appropriate to take account of her views? Precisely to what does she object? And if the answer to the first question is that she is of an age and maturity and secondly if her objection is well-directed should I exercise my discretion not to order her return?

The question of this part of Art 13 has been the subject of judicial interpretation on a number of occasions. I need therefore to look at the authorities to ascertain the guidance which they give me. The leading case is undoubtedly Re S (A Minor) (Abduction: Custody Rights) to which I have already referred and from which I have already quoted. Guidance is also given in Re M (A Minor) (Child Abduction) [1994] 1 FLR 390 which deals essentially with the procedure to be used when it becomes necessary to ascertain and evaluate the child's degree of maturity and to ascertain the basis of the child's objection to being returned. There is, however, the following passage in that case at p 395 where Butler-Sloss LJ says this:

'[Counsel] for the father, who opposed the involvement of the court welfare officer, argued that the children had no objection to returning to their own country, Australia. Their objection was to returning without their mother to their father. In his submission the wording of the Convention required an objection to the country and not to the person. Consequently the objections of S to returning to his father were irrelevant.

It is true that Art 12 requires the return of a child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It also fails to take into account Art 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same. The decision of this court in Re C (A Minor) (Abduction) [1989] 1 FLR 403 related to an application under Art 13(b) and the attempt of the mother to create an intolerable situation for the child by refusing herself to return. 1 am satisfied that the wording of Art 13 does not inhibit a court from considering the objections of a child to returning to a parent.

The court has however to be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the State of habitual residence. If the only objection is his preference to be with the abducting parent who is unwilling to return, this will be a highly relevant factor in the exercise of discretion. Otherwise an abducting parent would be likely to encourage the older child to remain and frustrate the purpose of the Act. The court has to assess the ability of the child to understand the situation and whether he has valid reasons for not returning.'

She then refers to a number of cases in which the court has considered that very question.

In Re S (A Minor) (Abduction: Custody Rights) Balcombe LJ gives detailed guidance for the establishment of the facts necessary to open the door to Art 13 and although the passage is a lengthy one I think it necessary for me to read it (see [1993] Fam 242 at pp 250-251, [1992] 2 FLR 492 at pp 500-501):

'(a) The questions whether:

(i) a child objects to being returned; and

(ii) has attained an age and degree of maturity at which it is appropriate to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge. Miss Scotland submitted that the child's view should not be sought, either by the court welfare officer or the judge, until the evidence of the parents has been completed. We know of no justification for this submission. She also asked us to lay down guide-lines for the procedure to be adopted in ascertaining the child's views and degree of maturity. We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Hague Convention is primarily designed to secure the speedy return of the child to the country from which it has been abducted.

(b) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

(c) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we. In this connection it is material to note that Art 12 of the United Nations Convention on the Rights of the Child (which has been ratified by both France and the UK and had come into force in both countries before Ewbank J's judgment in the present case) provides as follows:

"Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

(d) In our judgment, no criticism can be made of the decision of Ewbank J to ascertain C's views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that C objected to being returned to France and that she had attained an age and degree of maturity at which it was appropriate to take account of her views.'

He then turns to the exercise of discretion under Art 13 and continues as follows:

'(a) The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Convention - see Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106 at p 122E, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 28 per Lord Donaldson of Lymington MR.

(b) Thus if the court should come to the conclusion that the child's views have been influenced by some other person, eg 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. Thus in Layfield v Layfield in the Family Court of Australia on 6 December 1991, Bell J ordered an 11-year-old girl to be

returned to the UK because he found that, although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia per se, but to remain with her mother who had wrongfully removed the girl from the UK to Australia. On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return.'

He then cites the passage from Re M, the unreported decision of the President to which previous reference has been made, in which the President says this:

'I am, however, concerned, for the children. I find they do object to being returned and that each of them has attained an age and a degree of maturity at which it is appropriate to take account of their views. I feel that I must take account of their views. Their views are not however determinative of the position and I have to consider how far they should affect me.

I feel that I should give effect to their objection in this case in the light of the fact that they give valid reasons, in my judgment, for objecting to going back to the USA into the care of their father, because of his former conduct. I consider that he has materially admitted this. I do not therefore propose to order their return. That is the sole extent of the order that I make. I do not determine custody rights or access rights or any other rights as between the parties. But in the light of the children's objections to being returned, I decline to order their return under the terms of the [Hague] Convention . . .'

There is then reference to another case in Canada and on the facts of the particular case before the Court of Appeal Balcombe LJ comments that:

'In the present case C objected strongly to being returned to France. Her reasons, as given to [the court welfare officer], had substance and were not merely a desire to remain in England with her mother. This court cannot interfere with the judge's exercise of his discretion [not to order her return] . . .'

The Lord Justice concludes his judgment with this:

'Nothing which we have said in this judgment should detract from the view, which has frequently been expressed and which we repeat, that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed. This is an exceptional case and accordingly we dismiss this appeal.'

The decision of Re M (Minors) (Abduction) to which Balcombe LJ refers is now reported at [1992] 2 FCR 608 and for this purpose I propose to read only the headnote:

'The parents are United States citizens and had lived in California. They had three children. At the time of the present hearing they were aged 11, 9 and 8 respectively. The parents were divorced in 1985. They were granted joint legal care of the children with physical custody to the mother. In June 1989 the mother brought the children to England. The father was not immediately aware of the mother's whereabouts but in January 1990 commenced proceedings under the Hague Convention. He sought the return of the children to California. It was accepted by the mother that her removal was wrongful within the meaning of Art 3 of the Convention. By Art 12 the court was required to order the return of the children forthwith unless the provisions of Art 13 applied.'

There is then a reference to the terms of Art 13, including the question of the children's age and maturity and views:

'The mother gave evidence that each of the children did not want to return. The father had written a letter to the mother and children 3 days after they had come to England in which he acknowledged hitting the children and losing his temper with them. The President arranged for a court welfare officer to see each of the children separately. She reported that each of them said they did not want to go back to the USA as the father hit them.

Held: Each of the three children had attained an age and a degree of maturity at which it was appropriate to take account of their views. They each objected to being returned but their views were not determinative of the application. They gave valid reasons for objecting to a return because of the father's former conduct. In these circumstances the court should give effect to their objection and it would decline to order their return.'

It is plain to me, as the extract which I have read from Re S makes clear, that the ratio of the judgment in Re M was not merely the children's objection to being returned but the fact that the father admitted the basis of their objection, namely, that he had hit them. In B v K [1993] 1 FCR 382 Johnson J exercised his discretion not to return two 'sensible and intelligent children' aged 9 and 7 to Germany, holding that they were of an age and maturity at which it would be appropriate to take account of their view. Unfortunately the report does not state the nature of the children's objection or the basis on which the judge acceded to it and the decision does not therefore materially assist me in the exercise of my discretion in the instant case.

Against this background how do I exercise my discretion? First of all I have to say that I am not satisfied that P has indeed reached an age and degree of maturity at which it is appropriate to take account of her view. She was not forthcoming to Mr Maines. I am not satisfied that she understands the distinction made by the Court of Appeal in Re S and the President in Re M between an order for her immediate return to the USA for her future there to be decided and an objection to her return in any circumstances.

In my judgment the phrase, 'I would be afraid to go back, it would be the same', is the natural language used by a child who does not wish to return to live in a household in which she recollects physical chastisement. Her answers to Mr Maines in my judgment in no way reflect the level and degree of understanding and maturity required by Re S In my judgment, therefore, this part of Art 13 defence falls at the first hurdle.

However, in case I am wrong about it I go on to consider how I should exercise my discretion if, contrary to my finding, P is indeed of an age and appropriate degree of maturity for me to be able to take her views into account. On this analysis P's objection is a fear that she will be struck again by her father. That is the same objection which was upheld by the President in Re M, albeit with the vital difference that in that case the father admitted the children's allegations which were thus firmly founded in fact. It is, however, clear that P's fear of violence based on recollection is a legitimate objection to her being returned.

If I were to find that she was of an age and degree of maturity and that her objection had a valid basis that unlocks the door to the exercise of discretion and I am entitled to consider her welfare. Here, as I see it, I have to take into account all the facts of the case and balance P's objection against the purpose of the Convention which itself imports the concept that it is in the interests of children for them to be promptly returned to their country of habitual residence for their future to be decided there.

In the exercise of this discretion as opposed to my assessment of the nature of P's objection it seems to me that I have to take into account the fact that P's fear of harm can and will be catered for by the umbrella of measures which the operation of the Convention itself puts in

place and that, despite her fears, she will in fact be protected by the laws of the State to which she is being returned and by the undertakings offered by her father.

I must also bear in mind the policy of the Convention and the fact that it could be easily circumvented by unscrupulous parents imposing on their suggestible children fears and anxieties which if uncritically accepted could persuade the court into orders which would frustrate the purpose of the Convention. The purpose of the Convention is that children cannot be moved across international frontiers or retained in a State other than that of their habitual residence without either parental agreement or orders of a court of competent jurisdiction. That is the function of the Convention, and its purpose and it is, in my judgment, that to which I must give effect unless the circumstances are exceptional, which in this case they are not.

I have therefore no doubt that even if I were satisfied of P's age and degree of maturity under Art 13 and that I should take account of her views I would on the facts of this case exercise my discretion and order her return to the USA. In my judgment, therefore, the defences under Art 13 fail and the children fall to be returned under Art 12.

I should say that in making my order under Art 12 I have been influenced by the letters from the father's lawyer, Mr Span, in which he makes clear that in the jurisdiction to which the children are being returned there will be attorneys available which will represent free of charge the parties in the Family Court and/or the Supreme Court who are unable to afford such representation and, secondly, that the Family Court is designed to address matrimonial matters without the assistance of an attorney. Thus (he says) the defendant in the above reference matter may make application in the Family Court for support of herself and the children without an attorney. The Family Court will assist her in making such application. Once in court an indigent person has the right to have a court-appointed attorney.

Furthermore in the recent materials from the USA it is plainly stated that the matter can be before the American court promptly. Mr Span says, in commenting on the father's latest affidavit, that:

'The affidavit also pledges that upon the children and the defendant's return we will immediately seek the United States court to review the issue of custody. We may move into court by a motion within 9 days of personal service of the motion upon the defendant. We may move into court even sooner on an ex parte motion for relief. I believe it is in the best interests of the children and my client's interests to have this brought before the court as soon as possible. I have my client's instructions and I give my word as an officer of the court that we will bring this matter before the United States courts well within the 30 days.'

In my judgment what this case needs is a swift resolution of the issues between the parties and a firm decision by a court of competent jurisdiction on where these children should live and with whom. In my judgment that exercise should take place in the USA and I therefore order the children's return to that jurisdiction.

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