HOUSE OF LORDS

Lord Browne-Wilkinson Lord Jauncey of Tullichettle Lord Mustill Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGEMENT IN THE CAUSE

IN RE H AND OTHERS (MINORS)

Oral Judgment: 11 November 1996
Reasons: 10 April 1997

LORD BROWNE-WILKINSON

My Lords,

In this appeal three young children were removed by their mother, the respondent, from their home in Israel and brought to England without the consent of the appellant, their father. Some six months after the date of such removal, the father applied to the courts in England for an order directing the summary return of the children to Israel under the Hague Convention on the Civil Aspects of International Child Abduction, 1980. Under the Convention, the English court was bound to order such summary return unless the father had "acquiesced" in the removal of the children. Sumner J. held that the father had not so acquiesced. The Court of Appeal (Stuart-Smith, Waite and Otton L.JJ.), The Times, August 14, 1996 reversed that decision, holding that the father had acquiesced. On 11 November 1996 your Lordships allowed an appeal to this House and ordered the immediate return of the children, indicating that reasons would be given at a later date. These are my reasons.

The facts

The father was born in Israel: the mother in England. Both are strict Orthodox Jews. Their families arranged their marriage, which was celebrated in London in May 1991. Following the marriage, the couple spent much of their time in Israel but also substantial periods with the mother's family in England. There was a dispute before the judge whether or not the children were habitually resident in Israel. The judge held that they were so resident and his decision on that point was not subsequently challenged.

The oldest child was born in England on 3 October 1992; the second child was also born in England on 18 December 1993; the third child was born in Israel on 6 February 1995.

Unfortunately the marriage was not successful, partly at least because the mother was not happy living in Israel. On 9 November 1995 the mother flew to England with the children. At first she contended that the father had consented to this but it was accepted before the judge that the children were removed without the father's knowledge or consent. On 13 November 1995 the mother obtained an ex parte order from Edmonton County Court which, inter alia, prohibited the father from removing the children from the care and control of the mother or from England. That order was continued, inter partes, on 23 November 1995. However, the father did not receive the notice of that hearing until the day after it took place.

It is of central importance that both the father and the mother are Orthodox Jews. The father in his evidence deposes that their religious beliefs:

> ". . . involves us living by the Torah and an obligation, whenever there is a problem, to refer matters to my Rabbi and seek his advice. Under the terms of our religious persuasion we are obligated, in the event of a dispute between the two members of the community, to appeal to a 'Beth Din.' This is, in effect, a religious Court of Law and according to our law I am not able to seek the help of a 'regular' Court of Law unless authorised so to do by the Beth Din. It is because I am an Orthodox Jew that I have proceeded in this case in the way that I can now recount. The simple position is that if I had sought the assistance of any court other than the Beth Din (without their consent) I would have been subject to effective excommunication from my lifestyle and from my faith. This would have had the effect, inevitably, of destroying my community life. I would have been forbidden ever to go to any synagogue and never again invited to an Orthodox Jew's home -- even those of my own family. None of my present friends and acquaintances would again speak to me."

On hearing of the English proceedings, the father immediately consulted his local Beth Din in Israel ("the Israel Beth Din"). He was told to ignore the English order and not to take part in the English proceedings. On 26 January 1996 the Israel Beth Din issued a summons to the mother directing her to attend that court in Israel on 19 February 1996 "for the purpose of a Get (Bill of Divorcement) and the ramifications thereof." The mother, having failed to attend the Israel Beth Din, received further summonses on 19 and 28 February 1996. At this stage the mother consulted her Beth Din in London which sent a letter to the Israel Beth Din saying that the dispute should be resolved in London not in Israel. On 11 March the Israel Beth Din informed the mother that her submission that there should be rabbinical proceedings in England was rejected and served her with a fourth summons to attend the Israel Beth Din, this time on 18 March 1996. On 15 March the London Beth Din again wrote to the Israel Beth Din claiming that the London Beth Din was the appropriate forum. On 21 March the

Israel Beth Din rejected that submission and issued a fifth summons against the mother to appear on 22 April 1996.

At the end of March or in early April 1996 the father asked the mother to agree that the children should come to spend Passover with him in Israel, promising to return them to her after the festival. The request was refused. At some stage in early April the father first learned of the existence of the Convention. In consequence, when the mother failed to appear on 22 April 1996 before the Israel Beth Din, it made an order authorising the father to take whatever steps he saw fit. The father then immediately invoked the Convention procedures as a result of which on 3 May 1996 the father's originating summons was issued seeking the summary return of the children under the Convention.

Finally by a letter dated 25 March 1996 but in fact not sent until the middle of May 1996 the London Beth Din requested the father to withdraw the Convention proceedings to avoid "contempt and slander" against the father for taking proceedings in the secular courts.

The Convention

The Convention was signed in 1980 and a large number of countries, including the United Kingdom and Israel, have acceded to it. It was incorporated into the law of the United Kingdom by the Child Abduction and Custody Act, 1985, section 1(2) and Schedule 1. The recitals and Article 1 of the Convention set out its underlying purpose. Although they are not specifically incorporated into the law of the United Kingdom, they are plainly relevant to the construction of an international treaty. The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the State of his habitual residence.

Articles 3 and 4 provide, so far as relevant, that the removal or retention of a child under 16 is wrongful when it is effected in breach of rights of custody enjoyed by a person under the law of the State where the child was habitually resident. Articles 6 and 7 provide for each Contracting State to establish a Central Authority. Under Articles 8 and 9 a person claiming that a child has been wrongfully removed or retained can apply to the Central Authority of the State of habitual residence, which then transmits the application to the Central Authority of the State to which the child has been abducted. Under Article 10 the latter Central Authority must seek the voluntary return of the child. If this proves impossible, proceedings for return of the child to the country of habitual residence are brought before the judicial or administrative authorities of the State to which the child has been abducted.

For present purposes, the critical provisions of the Convention are contained in Articles 12 and 13 which, so far as relevant, provide as follows:

> "Article 12
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> 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. . . . "

"Article 13

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. . . " (emphasis added).

Under Article 16, the courts of the State to which the child has been abducted are not to determine the merits of a custody claim after receiving notice of a wrongful removal or retention until it has been determined that the child is not to be summarily returned or unless an application is not lodged within a reasonable time following receipt of the notice.

In the present case, therefore, the following points had to be considered and determined by the English court:

1. Whether the father had rights of custody in Israel: Article 3. This was admitted by the mother.

2. Whether the children were habitually resident in Israel: Article 4. The burden of so proving was on the father. The point was disputed by the mother but the judge held them to be so resident and there was no appeal on this point.

3. Whether the father had consented to the removal of the children from Israel, the burden of proof being on the mother: Article 13. The mother did not contend before the judge that the father had consented to the removal of the children.

4. Whether the father had acquiesced in the removal or retention of the children, the burden of proof being on the mother: Article 13. If he had not so acquiesced, the judge was bound by Article 12 to order the summary return of the children to Israel. The mother alleged that the father had acquiesced in the removal of the children. The judge held that he had not.

5. If, contrary to the judge's finding, the father had acquiesced in the removal of the children, under Article 13 the judge, although not bound to order their summary return, had a discretion whether or not to do so.

The Judge's decision

The judge directed himself in law that "acquiescence" as used in the Convention means conduct by the aggrieved parent subsequent to the unlawful removal which is inconsistent with his insistence on the summary return of the children under the Convention.

The mother's case was that the father, by pursuing his claim in the Israel Beth Din, had elected to proceed in the religious courts for divorce and was not, on the evidence, even seeking return of the children in the Beth Din proceedings. In addition, she argued that the father's request that the children should go to Israel for Passover and then be returned to England was inconsistent with seeking an order for the children's immediate return. The judge rejected these submissions holding that the father, as his evidence showed, was throughout anxious to secure the return of the children to Israel and that his recourse to the Israel Beth Din in accordance with the requirements of his religion was not inconsistent with his later (when the religious authorities permitted it) seeking summary return under the Convention. Unfortunately, the judge was misled by the letter from the London to the Israel Beth Din (wrongly dated 25 March but not in fact sent until after these proceedings under the Convention were started) as showing that the mother's religious advisers were themselves taking the view that procedure in the Beth Din was the right course. He further held that the request by the father for access was the act of a man waiting for the Israel Beth Din to secure the return of the children but desperate to see them and was not an act showing that he acquiesced in their remaining in England. The judge accordingly ordered the immediate return of the children to the father in Israel on the father's undertaking, amongst other things, to start appropriate family proceedings in the civil courts in Israel.

The decision of the Court of Appeal

Waite L.J. (with whose judgment the other members of the court agreed) after setting out the facts and Article 13 of the Convention stated the law to be as follows:

> "The phrase 'subsequently acquiesced in the removal or retention' has been elaborated in England by case law. The governing authorities are *In re A. (Minors) (Abduction: Custody Rights)* [1992] Fam. 106, *In re A. Z. (A Minor) (Abduction: Acquiescence)* [1993] 1 F.L.R. 682 and *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819. Their general effect, to summarise it shortly, is as follows. In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence. 'Summary return' means in that context an immediate or peremptory return, as distinct from an eventual return following the more detailed investigation and deliberation involved in a settlement of the children's future achieved through a full court hearing on the merits or through negotiation. Such conduct may be active, taking the form of some step by the aggrieved parent which is demonstrably inconsistent with insistence on his or her part upon a summary return; or it may be inactive, in the sense that time is allowed by the aggrieved parent to pass by without any words or actions on his or her part referable to insistence upon summary return. Where the conduct relied on is active, little if any weight is accorded to the subjective motives or reasons of the party so acting. Where the relevant conduct is inactive, some limited enquiry into the state of mind of the aggrieved parent and the subjective reasons for inaction may be appropriate."

He then summarised the judge's judgment and recorded that the case argued on behalf of the mother on appeal was based on two propositions. First, that the judge had misdirected himself in law since this was a case of "active acquiescence" and the judge had wrongly relied on the father's "subjective motives" for failing to invoke the Convention promptly. Second, that the judge (misled by the dating error) had wrongly attached significance to the letter dated 25 March 1996 as showing that the mother had herself gone along with the matter being dealt with in the Israel Beth Din. He held that both the mother's arguments were correct. After saying that the father had acted entirely properly within the tenets of his faith in not taking Convention proceedings until authorised by his Beth Din, he continued:

> ". . . That is beside the point, however, when it comes to a consideration of the objective inferences to be drawn from the fact that he took active steps towards a settlement or adjudication of the matrimonial differences through the medium of the Beth Din, and persisted in those steps for many months, without making any overt statement that he was insisting upon the summary (as opposed to the eventual) return of the children."

He gave some weight to the father's request for access over Passover and to the judge's misdirection as to the letter wrongly dated 25 March and held, applying the principles of law that he had set out, that the judge ought to have found that the father had acquiesced.

Waite L.J. then proceeded to exercise the discretion which arises under Article 13 where there has been acquiescence and held that the determination of the future of the children should be conducted by the courts of this country not those of Israel.

Waite L.J. added the following footnote:

> **"FOOTNOTE**
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> It would be a pity if anyone reading this judgment gained the erroneous impression that recourse to the courts, or to the conciliation procedures, of religious authorities carries the automatic stamp of acquiescence by an aggrieved parent in the wrongful abduction of a child from the country of habitual residence. The role in these international cases of priest and mullah, mediator and elder, can often be invaluable in bringing about through parental concilation the harmony in the lives of children which it is the express purpose of the Convention to achieve. What is important is that the aggrieved parent should make it plain that such recourse is being adopted as a step ancillary to, or in parallel with, the Convention's remedy of summary return, and not in substitution for it."