---

http://www.incadat.com/ ref.: HC/E/UKe 60
[17/11/1994; Court of Appeal (England); Appellate Court]
Re R. (Child Abduction: Acquiescence) [1995] 1 FLR 716, [1995] Fam Law 290

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

17 November 1994

Balcombe, Millett LJJ, Sir Ralph Gibson

In the Matter of R.

Patricia Scotland QC and Indira Ramsahoye for the mother

Jeremy Posnansky QC and Heather Pope for the father

BALCOMBE LJ: On 14 October 1994 Ewbank J made two orders: the first was in proceedings by the father of two boys aged 7 1/2 and 6 under the Child Abduction and Custody Act 1985: he refused to order the return of boys to Illinois under the Hague Convention. He also directed that the appropriate court to deal with any further issues was the Illinois court. It is not clear to me what further issues could arise in those proceedings. The second order was in wardship proceedings by the mother concerning the same two boys. In that order he directed that they remain in the interim care and control of the mother pending any further order of the Illinois Court. From these orders both parties appeal. The mother seeks an order that the wardship should continue in the High Court. The father seeks an order for the return of the children under the Hague Convention.

The mother is a British citizen born on 28 January 1961, now aged 33 years. She comes from Wales. The father is a citizen of the USA. He was born on 9 July 1957 and so is now aged 37 years. The parties married in the UK on 29 March 1986. Soon afterwards, the father was posted to Germany by the Defence Department of the United States. On 22 January 1987 the first child of the marriage was born. The second child was born on 12 August 1988. Differences arose between the parents and, on 30 March 1989, they were divorced in Germany. They became reconciled and, on 22 December 1989, they married again, also in Germany. In 1990 the father was posted back to the USA and the family as a whole moved to Fulton, Illinois. On 28 February 1994 they were again divorced, this time in Illinois. The mother was legally represented by a lawyer, for whom, as I understand it, the father paid. The father was not so represented.

The order made by the Illinois court expressly approved and incorporated an agreement called the 'Joint Parenting Agreement'. It awarded care, custody and control of both children to the father in accordance with the terms of the 'Joint Parenting Agreement', to

which I shall refer in a moment, and reserved jurisdiction over the parties for the purposes of enforcing the terms of the order.

The 'Joint Parenting Agreement', which clearly bears evidence of having been drafted by a lawyer, is dated 17 February 1994. It is made between the mother and the father and provides in para A:

'Both the father and the mother are fit and proper persons to be awarded the care, custody and control of [the two boys] . . .'

It gives joint custody of the two boys to the father and the mother, with a proviso that the father should be designated as custodial parent and the mother designated the non-custodial parent, and the father should have the situs of the custody of the children.

There are then specific provisions dealing with education, medical and health care. Under para D there is a heading 'Visitation':

'It is contemplated by the father and the mother that the mother will resume residence in her native country, England [I interpolate, Wales] and that the traditional or customary visitation pattern is impractical under these circumstances. Therefore, it is agreed that commencing with the summer of 1995, the children shall spend their summer school recess with the mother in England with the vacation visitation to begin 3 days after school classes have dismissed for the summer and shall continue until the week prior to the commencement of the fall school term. The father shall prepay round trip air fare for each of the children facilitating this visitation. For the school summer vacation, the children shall be entitled to one month summer vacation visitation with their mother and the father shall prepay the air fare for the children to facilitate this visitation.'

There are provisions dealing with the Christmas vacations.

There is an express provision that:

'The parties shall adhere to the following rules with respect to the custody of and visitation with the minor children',

of which para 4 is, in particular, relevant and provides:

'. . . The non-custodial parent [the mother] shall not threaten to prevent or delay the return of the children to the custodial parent after a period of visitation.'

I mention para E of the 'Joint Parenting Agreement' headed 'Modification of custody':

'It is stipulated and agreed by and between the father and the mother that the mother shall be entitled to be the custodial parent of the minor children in the event of the death or physical incapacity of the father; in the event the father is assigned or transferred for employment outside the continental United States or when either child articulates a desire to reside with his mother.'

Finally, I mention para G which deals with 'Mediation of Conflicts' which provides for attempted negotiation or settlement and ultimate mediation by a court of competent jurisdiction.

The 'Marital Settlement Agreement' is primarily concerned with financial matters, but did incorporate the substance of the 'Joint Parenting Agreement'.

On 22 March 1994 the mother left the USA and went to live in Wales, initially with her parents. The father and the two boys continued living in the family home at Fulton, Illinois. Both boys continued to attend school there. As early as 17 May 1994 the mother had apparently instructed solicitors to write to the father asking him to let them have suggestions for dates for the one-month summer holiday staying contact. It is not clear to me why the employment of solicitors was necessary at such an early stage. On 25 May 1994 the father bought return air tickets for both children to travel from Chicago to Heathrow on 7 July 1994, returning from Heathrow to Chicago on 25 August 1994. The children flew from Chicago to Heathrow for staying contact with their mother and arrived on 7 July 1994. Very quickly they were entered by the mother and started attending local primary school in Wales for the residue of what was then the summer term. Between July and August 1994 there were occasional telephone calls between the father and the children, approximately weekly until mid-August, at which time the father only met an answerphone when he telephoned.

The mother's evidence is, and I shall be having to refer to this later, that immediately on their arrival the children had expressed a marked aversion to returning to their father in the USA. By 3 August 1994 she had made a statement to her solicitors. Very soon after, on the advice of counsel, instructions were given by the mother's solicitors to Dr Gay, a child psychiatrist, in order that he might interview the two boys which he did on 23 August 1994, and I shall be referring later in this judgment to his report.

On 24 August 1994 the mother issued her originating summons in wardship in the High Court. A letter was sent airmail to the father by the mother's solicitors, notifying him of the mother's actions and decision. In the normal course of events it was unlikely the letter written on 24 August 1994 could have reached him by 25 August 1994, the date the children were due to return. It is not surprising that the father, unaware of what was happening, travelled to O'Hare Airport, Chicago to collect the children and was extremely disturbed when he found they were not on the plane on which he expected them. He made inquiries of the police in Wales and discovered that the children had not come, as he feared, to any harm. He thought they might have been involved in some sort of accident.

On 26 August 1994 he contacted a lawyer in the USA who was not experienced in this field and said that there was not much he could do. He then contacted the office of his local senator and, on their advice, contacted the United States' State Department in Washington DC who, thereupon, sent him their publication dealing with international parental child abduction and the appropriate forms. On 27 August 1994, 2 days after the children should have been returned, the father made a telephone call and spoke to the maternal grandfather of the children. In his evidence the grandfather describes that call in the following terms:

'On Saturday, 27 August 1994 at approximately 11.30 am I received a telephone call from the plaintiff who was in an aggressive mood and alleged that my wife and I were part of a plot to abduct his children, and that we would be arrested on sight in the USA. He was in such a rage that I terminated the conversation.'

On the following day there was another telephone call by the father to the grandfather with which the grandfather deals in these terms:

'On 28 August 1994 having first telephoned my son-in-law in Kent the plaintiff rang again to speak to me and apologised for his behaviour of the day before. He indicated that he had no intention of doing anything to get the children out from which I assumed he meant that he did not intend to seek an order for their return. He asked me to assist in him persuading [the mother] to return to him with the children so they could, I assume, live as a family again. At

this point I said that I did not wish to interfere but would endeavour to persuade [the mother] to ring him.'

On the same day, 28 August 1994, the father wrote a long letter to the mother. I shall have to quote from parts of that letter which runs, even in typescript, to over three pages. It clearly bears the indication of being written in a state of high emotion which again, in the light of what had happened, is hardly surprising:

'Dear S, I don't believe I've ever in my life felt so compelled to straighten out what has become of my life as I do right now. As I'm sure you know, I went to Chicago to pick up the boys, only to find they were not on the flight. Not knowing why, I was frantic, thinking you'd been in an accident or who knows what. I do get hold of the Tregaron police, and they called me later to make assure me that the boys were OK. The next day I called Tom Senneff [I interpolate, he was the lawyer whom the mother had employed at the time of the divorce in February 1994] to see what he knew, and he told me he had a fax from your solicitor on Thursday morning. So now I know why, but I guess I would've rather had heard it from you.

S, I am not blaming you for this; I'm now not totally surprised, and I'm not going to attempt to undo what you have done, partly because you know I can't, and partly (mostly) because this hammer blow to [my] senses tells me I must at least try a different path -- for the boys, for you and for me.'

Then the father makes it clear in this long letter that he was seeking a reconciliation because the prospect of being without the boys and his ex-wife was abhorrent to him. He says a little later that the boys deserve both a mother and father who love them equally. He says he has learned from what he considers his past mistakes. He concludes the letter in the following terms:

'. . . as I said at the beginning of this letter, I can't just sit and watch everything that is important slip away forever. Where I live, the job that I do- these things are not important and I'd give them up in a minute if things could be made right between you and I. I am sorry for all I put you through and only ask that you consider these words before you chuck me out of your life forever. Give the boys a hug for me and tell them I love them.'

The father spoke to the mother by telephone on 29 August 1994. There are two accounts of that telephone call on the evidence. The mother's account is as follows:

'On 29 August 1994 at nearly midnight I received a telephone call from the plaintiff. He stated that he was not angry with the action I had taken and just wished to know that his sons were well. He indicated that he did not blame me for keeping them and would not make any attempt for them to be returned to the USA or attempt to get them back. He then told me he had written to me with a proposition for my consideration and asked me to look at the letter and then write to hIm. He then asked if he could speak to the boys and I told him to telephone on Sunday, 4 September 1994.'

The father's account of that telephone conversation is as follows:

'I did speak to the defendant on 29 August 1994 and after the telephone call I wrote the letter exhibited to her affidavit.'

(That is an error if the dating is correct, but it does not matter for present purposes.)

'I did say that I did not blame her for doing what she had done. I explained that I understood her feelings as a mother and that I could understand that when the end of the holiday came the defendant just could not bear to let the children return. I wanted to assure her that I would not be attempting any sort of "heroic" action which some people had suggested and get on the next flight and snatch the children. I however did not say that I agreed that the children should stay in Wales with their mother without anything further being done. I hoped that if it was possible I could go through legal channels if she did not think that it was possible to try again with the marriage for the sake of the boys as per my proposal in the letter that I sent to her.'

On 2 September 1994 the father, having received the forms from the State Department, filled in those forms and applied to the State Department, as the central authority in the USA, pursuant to the Hague Convention. Two days later, on 4 September 1994, he spoke to the children by telephone. The mother's account of that conversation is:

'On 4 September 1994 the plaintiff telephoned and spoke to [the elder son]. He advised [him] that he was packing their "things" to send to him and what else would [he] like to be sent. He said he was not angry at [him] wanting to stay with me and that was "OK with him". Despite my entreaties [the younger son] said he did not wish to speak to his father and when I relayed this to the plaintiff he said he was not angry and I reinforced this to [the boy]. [The boy] then spoke to his father who again asked what things [he] wanted.'

The mother then says that she spoke to the father and indicated that she would never consider returning to him.

The father's account of that conversation is as follows:

'When I spoke to [the elder son] on 4 September 1994 I had by that time made my application to the State Department but I had been informed by the US central authority that if my application was successful it could take months if not years for the matter to be determined.'

(I pause to interpolate that, whatever may happen in other jurisdictions, the record in this country is a good one as I think is indicated by the timetable in this case.)

'They told me they had some cases on their files that had been going on for years. However, I then spoke to Batchelors solicitors who were requested to act on my behalf by the Child Abduction Unit in London. They gave me to understand that the matter might be settled in my favour and that a decision would probably be forthcoming a lot sooner than I imagined. I therefore did not send the children's things to them as it might mean that they would just have to be sent back again if they were returned to me.'

The proceedings under the Hague Convention took their course. There was a referral to the Lord Chancellor's Department by the State Department. Solicitors were instructed on the father's behalf by the Lord Chancellor's Department and the originating summons was issued on 9 September 1994.

I can deal quite briefly with the remaining chronology: on 28 September 1994 Kirkwood J, in the Convention proceedings, ordered that the Official Solicitor be appointed, subject to his consent, to assist the court on the question of the minors' level of understanding and their wishes. As a result of that, Dr Bugler, a child psychiatrist, was instructed by the Official Solicitor on behalf of the children. He interviewed them and the report is dated 10 October 1994. I shall be referring to it in due course.

There was then the hearing before Ewbank J culminating in the judgment of 14 October 1994. It is a long judgment. It rehearses most of the factual matters that I have already mentioned. I can take it up at the relevant part:

'It is said on behalf of the father that every single point that can be taken under the Hague Convention has been taken in this case, except for the suggestion that no order should be made because the children have been in England for over a year. Since they have only been here a matter of weeks, of course that point could not be taken, but it is fair to say that all the other points possible seem to have been taken.'

He then deals seriatim with the points which had been taken on behalf of the mother: first, that the children were not habitually resident in the State of Illinois and, therefore, the retention was not wrongful under the Hague Convention. He rejected that point and it has not been revived before us.

He dealt with the point taken, on behalf of the mother, under Art 13(b) of the Hague Convention that there was 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. He rejected that contention and that, too, has not been revived before us.

However, he did accept the contentions of the mother, first, that there had been acquiescence by the father within the meaning of Art 13(a) of the Hague Convention. Secondly, he thought it was appropriate to take into account the objections of the children to their return under a later provision of Art 13. I must deal with that in rather more detail later. His conclusions are to be found at the end of his judgment. I quote:

'Having come to the conclusion that the father has acquiesced in the retention of the children and that the children object to being returned and have reached an age and degree of maturity at which it would be appropriate to take account of their views, this court is in a position where it is not bound to order the return of the children to America. Since on the face of it the trigger conditions have been met under subpara E'

(that is a reference to para E of the 'Joint Parenting Agreement' and to that provision which provides that custody shall be changed from father to mother when either child articulates a desire to reside with his mother)

'. . . it would appear that if the mother were to apply to the court of Illinois, the court would transfer the custody to her in accordance with the joint parental agreement which has been made part of the court order. It is not automatic but I know of no ground which the father could put forward at this stage to indicate that it would not be in the interests of the children.

Accordingly, it seems to me that the appropriate course is for the children to remain with the mother in England, at any rate for the time being. I am aware of the problems that the mother may face if the case has to be decided in Illinois if a substantive defence is put forward by the father. But, on the face of it, she should be in a position to apply to the Illinois court for a variation of its order in accordance with the agreement which is signed by the parties, and the Illinois court, so far as I can see, will implement the agreement. Accordingly, although I say that the children are to remain in England with the mother, the appropriate court to deal with the question of custody is the court of their habitual residence, of their nationality, of the former matrimonial home. The appropriate court, accordingly, to deal with any further issues is the court of Illinois.'

It was in consequence of that judgment that the judge made the order that I referred to at the outset of this judgment.

Since then there has been a further order of the Illinois court made on 7 November 1994. That order makes it clear that process had been served on the mother, that she had not appeared to the application, but that nevertheless the judge knew of what had happened in England because in para 5 of the order it is recited:

'That a transcript of the judgment of Ewbank J dated 14 October 1994 has been filed with this court and considered.'

The Illinois judge did not take the same view as Ewbank J that para E of the 'Joint Parenting Agreement' automatically required the transfer of custody to the mother. He ordered that the mother should immediately return the two children to the custody of the father and the jurisdiction of that court, and made other provisions relating to practical matters. The result appears to be, and I think is substantially accepted by the parties, that the order made by Ewbank J has become academic. He contemplated that the Illinois court would do one thing and the Illinois court has done exactly the opposite. Even if it had not become academic, I do not understand how the orders Ewbank J made can be reconciled. Assuming the judge is right about the father's acquiescence, and the appropriateness of taking into account the children's objection to being returned, if he thought the Illinois court was the appropriate court to deal with the case, it seems to me he should have returned the children to Illinois under the Hague Convention. The realistic alternative was to keep the children here and let the English court deal with the case.

He seems to have been bemused by the idea that, because of para E of the 'Joint Parenting Agreement', the Illinois court would be bound to award custody of the children to the mother. Yet he had been referred to the provisions of the Illinois statute, and to the case-law, which he accepted, that the Illinois court was not bound to give effect to the agreement between the parents, but had to look at what the children's interests required. That his understanding was wrong is demonstrated by the Illinois court order of 7 November 1994.

In the result, it is common ground before us that the judge's orders cannot stand and we must look at the case de novo.

We heard the father's cross-appeal on the Hague Convention first.

I turn to the relevant Articles of that Convention. Article 12, as is well known, provides:

'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',

unless one of the exceptions in Art 13 apply.

The relevant exceptions in Art 13 provide that a court:

'. . . 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

. . .

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 relevant to mention Art 18 which provides that the provisions of Chapter III (which includes Art 13) do not limit the powers of judicial and administrative authorities to order the return of the child at any time.

I turn to deal with the two issues under the Convention which were live before us. I deal first with acquiescence. There are a number of authorities of the English courts dealing with acquiescence and I will take them in chronological order. The first is Re A (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14. I refer first to the judgment of Stuart-Smith LJ, who was one of the majority in that case, where, at pp 119-120 and 26 respectively, he says this:

'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 court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known them or taken steps to obtain legal advice.

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

Later, in the same judgment, Stuart-Smith LJ said (at pp 121E and 27F respectively):

'If the express acceptance relied upon is, in truth, confused, equivocal and unclear, such as may be the case if it is written by a parent in a state of emotional turmoil, then of course it does not amount to an acceptance in clear and unambiguous terms.'

He went on to say that that was not the case then before him.

Lord Donaldson MR, again in the same case, said this (at pp 123H and 30B respectively):

'. . . an apparent acquiescence, followed immediately by a withdrawal, may lead the court to question whether the apparent acquiescence was real, or whether it was the product of emotional turmoil which could not reasonably be interpreted as real acquiescence.'

The next authority in chronological order is the decision in Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682. I refer to the passage from the judgment of Sir Donald Nicholls V-C at p 691:

'If the person who had care of the child consented to the removal or retention he cannot afterwards, when he changes his mind, seek an order for the summary return of the child pursuant to the Convention. Likewise if he acquiesces. It seems to me that the underlying objectives of the Convention require courts to be slow to infer acquiescence from conduct

which is consistent with the parent whose child has been wrongly removed or retained perforce accepting, as a temporary emergency expedient only, a situation forced on him and which in practical terms he is unable to change at once. The Convention is concerned with children taken from one country to another. The Convention has to be interpreted and applied having regard to the way responsible parents can be expected to behave. A parent whose child is wrongly removed to, or retained in, another country is not to be taken as having lost the benefits the Convention confers by reason of him accepting that the child should stay where he or she is for a matter of days or a week or two. That is the one edge of the spectrum.

At the other edge of the spectrum the parent may, again through force of his circumstances, accept that the child should stay where he or she is for an indefinite period, likely to be many months or longer. There is here a question of degree. In answering that question the court will look at all the circumstances and consider whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return. That is the concept underlying consent and acquiescence in Art 13. That is the touchstone to be applied.'

Finally, under this part of the case, I would refer to the decision of Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. I can go straight to the judgment of Waite LJ (at p 831A):

'There is a common thread that runs through all those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered "in all the circumstances" necessarily means there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to these subjective elements: they remain an inherently less reliable guide than to inferences drawn from overt acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken, it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as the judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?'

Looking at the letter of 28 August 1994, read as a whole, and at the evidence of the telephone calls, I find no clear and unequivocal words or conduct which could properly be interpreted as acquiescence on the part of the father. They are at least as consistent with his explanation, namely that he was not going to attempt what might be briefly called a 'reverse kidnap', as with acquiescence on his part. When you couple that with the evidence of his subjective intention, his contacting the State Department on 26 August 1994 and his formal application under the Hague Convention on 2 September 1994, the suggestion that he acquiesced in what the mother had done becomes, in my view, untenable. Even if, contrary to my view, there had been acquiescence, the extremely short period which elapsed before its clear withdrawal was known to the mother (at the latest in the second week of September 1994 and probably earlier) and the fact that the mother had not taken any steps to settle the children in reliance upon that apparent acquiescence -- she had already entered them in the local school in July 1994 - would be very relevant to the exercise of the discretion under Art

13(a). If authority be needed for that last proposition, it will be found in the judgment of Lord Donaldson MR in Re A (Abduction: Custody Rights) [1993] Fam at p 123, sub nom Re (A Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 28.

In bringing the alleged acquiescence, in the circumstances of the present case, into the balance against the policy of the Convention, that so-called 'acquiescence' would be of no significant weight.

I, therefore, leave the question of acquiescence and turn to the question of the children's objections to being returned. I comment first that there is no evidence that, in the interval between their mother leaving them in March 1994 and their arrival in Wales in July 1994, the boys had been disturbed or unsettled by her departure or were afraid of or disliked their father. There is a wealth of affidavit evidence from the USA to the contrary. Whichever court deals with the substantial issue of with which parent the boys are to reside - for that is the only question to be decided under the Hague Convention -- it will have to weigh that evidence against the evidence of the mother and her parents that the boys were asking not to be sent back to their father immediately on their arrival in the UK.

I accept, of course, the evidence of the two child psychiatrists that the boys expressed clearly to them their wishes to remain with the mother and not to return to the father.

In this context, it is now necessary to cite briefly from the reports of Dr Gay and Dr Bugler. Dr Gay says this:

'Both boys, in their own particular ways, described a variety of behaviours associated with their father which they indicated to me was the reason why they did not wish to return to him. They saw him as a mean man, someone who was not nice to them and certainly they remember him as someone who was not nice to their mother and this they found difficult to accept. They also [said] that since their mother had left he had not been nice to them, that he would shout at them and blame them for things happening around the house and I gained an impression, particularly as far as [the younger boy] was concerned, that he was really quite frightened of his father over issues regarding his general behaviour and his bed-wetting.'

A little later:

'From the boys' point of view they are quite clear that they wish to remain in the care of their mother. They have some expectations that they will perhaps move to a different home with their mother and they see the positive and supportive aspects of her care of them at the present time and contrast this quite spontaneously and vividly with the care provided for them by their father since he has looked after them on his own since January of this year.

Finally, from Dr Gay's report:

'Overall I feel that these two boys have a clear awareness of the nature of the discussion that we were having about their current and future circumstances. They clearly are very young children and this must be taken into account when bearing in mind their expressed feelings and wishes at the present time but I think they were quite able independently and spontaneously to share with me their current expressed desire to remain with their mother and to remain living in the UK.'

He deals with the question of whether they wanted contact with their father.

Dr Bugler - again these are very selective citations from his report-referring to his conversations he had with the boys, says:

'The emphasis was upon their hope and wishes that they would not have to return to their father. I do not recollect any emotionally loaded expression to want to be with their mother.

There was no evidence that their father has been cruel to [the two boys] but they are influenced by their memory of his treatment of their mother.'

Later:

'However, the major cause of their insecurity seems to me to be that they experience their father as erratic and unpredictable.'

Later:

'In summary in answer to the first question I was asked to consider: do the boys object to going back, I have to answer that they do.'

Later:

'I have indicated that I believe [the two boys] have found residence with their father unpredictable and his care undependable.'

He then assesses their maturity. He says:

'In short [the younger boy] might be considered to be more mature than the average 6-year-old.

It was a difficult day to judge [the elder boy's] maturity as he was palpably unwell.'

(I think he had a heavy cold.) 'However, I found nothing to suggest that he was lacking in the maturity that one usually associates with an 8-year-old.'

His conclusion was:

'I conclude that [the two boys] have each individually expressed a valid wish to leave their father and reside with their mother. I am also of the opinion that they are of sufficient maturity for their separate but simultaneous wishes to have all the possible consideration that the legal processes are able to afford them.'

The principles which are to be deduced from the authorities dealing with this aspect of the case are as follows.

First, English courts have refused to lay down any chronological threshold below which a child's objections will not be taken into account.

However, Mr Posnansky has supplied us with two schedules, one of English cases and one of overseas cases, where children's objections have been relied on as a ground for not returning them. In the English cases the youngest ages at which children were not returned, on reliance of their objection, were nearly 9 and 7: that is the case of B v K (Child Abduction) [1993] 1 FCR 382, [1993] Fam Law 17. The decision in this court of Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction: Child's Views) [1992] 2 FLR 492 concerned a little girl aged 9. So far as the overseas cases are concerned, with the exception of two German cases where children, in one case aged 8 and 6 and in another case aged 7, had their objections taken into account and given effect to, there is no case which Mr Posnansky has found where a child under 9 was not returned because of his or her objection. These cases to me merely illustrate the obvious, that the younger the

child is the less likely is it that it will have the maturity which makes it appropriate for the court to take its objections into account.

At this point, I should refer to a passage in the judgment of Waite LJ in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 at p 827:

'When Art 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalised appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question "Do you object to a return to your home country?" he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and short term. It seems to me to be entirely permissible, therefore, for a child to be questioned (even at the preliminary gateway stage) by a suitably skilled independent person with a view to finding out how far the child is capable of understanding - and does actually understand - those implications.'

The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases, of which this appears to be one, where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in Re M (A Minor) (Child Abduction) [1994] 1 FLR 390 at p 395 which I do not find it necessary to cite.

In the light of the psychiatric evidence in the present case, I find it difficult to say that it would be inappropriate to take the boys' objections to returning to their father in Illinois into account. That would be, in effect, to say that a child of 7 1/2 years (the age of the elder boy here) is too young to have his objections considered, and thus lay down a threshold age which we should, if possible, avoid doing. However, the consequence of taking their objections into account is that we may (I stress the word 'may') refuse to return them to Illinois under the Hague Convention, not that we must do so.

In exercising that discretion, it is clear that the policy of the Convention and its faithful Implementation by the courts of the countries which have adopted it, should always be a very weighty factor to be brought into the scales, whereas the weight to be attached to the objections of the child or children will clearly vary with their age and maturity. The older the child, the greater the weight; the younger the child, the less weight. If support be needed for that very obvious conclusion, it is to be found in the judgment of the Master of the Rolls in Re S (A Minor) (Independent Representation) [1993] Fam 263, [1993] 2 FLR 437.

For present purposes, I do not find it necessary to decide whether under Art 13, once the court has considered it appropriate to take the child's objections into account, it may also take into account other matters beside the policy of the Convention in the exercise of its discretion in deciding whether to refuse to return the child. The combination of Arts 13 and 18 suggests to me that it may well do so. Nevertheless, in this case, there is no evidence of any other matter relevant to the welfare of these children which is suggested as being relevant for our consideration so that the only relevant factors are the policy of the Convention and the children's objections.

To that exercise, there can, in my view, be only one answer. Were it not for the boys' objections, this would be the clearest possible case for the application of the Convention. I

need not recount the history which I have already mentioned, but refer in particular to the provisions of the 'Joint Parenting Agreement', the fact of the mother leaving and the fact that all this has arisen upon the occasion of the first visitation under the 'Joint Parenting Agreement'.

To allow the mother's actions in this case, in reliance on the boys' objections, to be upheld, would be to approbate just that sort of conduct which the Convention was intended to prevent. It is sometimes said that the Convention was to prevent the wrongful abduction of children. It also applies expressly to the wrongful retention of children after an authorised visit. The purposes of that are fairly clear. When parents separate and they are living in different countries, it is in the highest degree important for the welfare of the children generally that the custodial parent in one country, whether the father or the mother, can send the children for visitation, access or contact (whatever it be called it embodies the same concept) to the non-custodial parent in the confident belief that at the end of that period the children will return pursuant to any agreement or order of the court which already exists.

It is just as detrimental to the welfare of children generally that that confidence should be maintained as to prevent them from being abducted, because if a custodial parent fears that a child may not be returned pursuant to existing orders or agreements at the end of a visitation period, they will be reluctant to send the children for access and that must be to the detriment of children generally. That seems to me the clear social policy behind the Convention, which it is the duty of our courts to implement.

I return to the facts of this case. If, as the mother contends, the children's desires to live with her, as now articulated, should be given effect to under the 'Joint Parenting Agreement', and their overriding welfare now requires that they should now live with her in Wales, then the Illinois court is perfectly well able to decide that issue. So far the mother has not sought to appeal the Illinois decision. No doubt, if and when she does so, that court will reconsider its order of 7 November 1994 giving the residence of these boys to the father.

In the circumstances, I am clear that this is a case for the application of the Convention. I would, therefore, allow the father's cross-appeal and dismiss the mother's appeal.

MILLETT LJ: Two questions have been argued on this appeal: (1) whether the judge was right to conclude that he was not bound by the Hague Convention to order the return of the children to Illinois; and (2) if so, whether his decision, made in the exercise of his discretion, to refuse to order the children to be returned was so flawed that this court can and should interfere.

Acquiescence

Article 12 of the Hague Convention, so far as material, provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of 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.'

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 . . . had consented to or subsequently acquiesced in the removal or retention . . .'

The judge found that the father had acquiesced in the mother's retention of the children in Wales. His finding was based largely on his interpretation of a single sentence in a 4-page letter in highly emotional terms written by the father on 28 August 1994, that is to say, 3 days after the mother, without any prior warning, had failed to return the children. It was written, moreover, with the object of seeking a reconciliation. The judge did not, of course, rely exclusively on that sentence or letter. He considered it in the context of telephone calls by the father to the children's maternal grandfather and the mother on 28 and 29 August 1994 respectively and a later telephone call by the father to the children on 4 September 1994; and, primarily, in the light of the terms of the 'Joint Parenting Agreement' entered into between the parties some 6 months previously.

The relevant sentence in the letter of 28 August 1994 reads as follows:

'S, I am not blaming you for this; I'm now not totally surprised, and I'm not going to attempt to undo what you've done, partly because I know I can't, and partly (mostly) because this hammer blow to [my] senses tells me I must at least try a different path -- for the boys, for you and for me.'

My Lord has read the parties' respective versions of the telephone conversations. The judge made no finding as to which version should be accepted. In his judgment he said this:

'Taking this letter and the telephone calls in the context of what has happened this year in this family, I first of all look at the agreement whereby the father agreed that the mother was going to be entitled to custody if the children articulated a desire to live with their mother. The father knew at the time he wrote the letter and at the time of these telephone calls that the children were saying that they wanted to live with their mother. I am of the view that, in the light of the agreement that the father had made, he was accepting that the provisions of subs E [of the 'Joint Parenting Agreement'] were coming into force, and I read the letter and the phone calls as acquiescence in the situation.'

For my part, I deprecate this approach -- extracting a single and ambiguous sentence from a 4-page letter written in emotional terms and for a different purpose, speculating on its meaning, and treating it as evidence of acquiescence. I deprecate even more strongly the placing of reliance on conversations between the deprived parent and his children. In the circumstances, any responsible parent's chief anxiety is to allay the child's fears and disavow any feeling of anger on his part at what the mother has done. Such a conversation is not a natural vehicle for the communication of acquiescence in the mother's conduct and needs to be approached with very great caution, particularly if the conversation is being retailed by the child himself. To elevate remarks made in the course of such a conversation to the status of evidence of acquiescence is likely to result in serious distortion of the parent's true attitude.

Acquiescence is a question of fact. It is usually to be inferred from conduct; but it may, of course, be evidenced by statements in clear and unambiguous terms to the relevant effect. But the authorities show that nothing less will do. Like my Lord, I am quite unable to regard any of the statements made by the father, in the days immediately following the mother's failure to return the children, as clear and unambiguous statements of his acquiescence in her retaining them in Wales. The judge took the view that the father was reluctantly accepting that the provisions for the variation of custodial rights contained in the 'Joint Parenting Agreement' had come into force and that he had no choice but to acquiesce. I do not share that view. If the father's letter is read as a whole, it is quite plain that, as in his

telephone conversation with the child's maternal grandfather, he was not acquiescing. On the contrary, he was pleading for a reconciliation and desperately seeking a solution in which the mother would return with the children to live with him, preferably, but not necessarily, in Illinois. In my judgment, the evidence did not establish that the father acquiesced in the mother's retention of the children alone with her in Wales. He was willing to accept almost anything but that. I find it impossible to conclude that anything which the father said or did was inconsistent with his invocation of the Convention to obtain an order for the summary return of the children to Illinois if, as happened, the mother was not prepared to accept a reconciliation.

The children's objections

Article 13 also provides:

'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 children in the present case are aged 7 1/2 and 6 years. Counsel for the mother has submitted correctly that there is no hard and fast rule which lays down a minimum age below which the views of child need not be taken into account. She accepts, I think, that it would be most unusual for a court of any of the Contracting States, except perhaps Germany, to have regard to the views of children as young as 7 1/2 and 6 years; but she says correctly that there is no rule of law to this effect.

Whether any particular child has attained sufficient age and maturity, she submits, is a question of fact and depends upon the circumstances of the particular case. In the present case, she says, there was evidence on which the judge could properly find that these children were of sufficient age and maturity for it to be appropriate to take their views into account, and accordingly, she submits, we cannot interfere with his finding. It follows that the court is not bound to return the children, though it has power to do so in its direction.

I do not think that that submission pays adequate regard to the actual wording of Art 13: '. . . has attained an age and degree of maturity at which it is appropriate to take account of its views'. That does not, of course, mean: 'to take account of the child's views generally'; but to take account of the child's views on the particular question, that is to say the question of whether the child should be returned to his home country. Whether the child does object, his age and degree of maturity are all questions of fact to be determined upon the evidence; but whether, given the child's age and the degree of maturity which he is shown to possess, it is appropriate to take account of his views on the question whether he should be returned is not, in my view, a question of fact at all but a question of judgment.

It is to be observed that, if a child is not of an age and degree of maturity which makes it appropriate to take his views into account, he must be returned despite his objections and without any further inquiry whether his return is in his best interests. If, on the other hand, he is of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes unless there are countervailing factors which require his wishes to be overridden. This latter case is provided for by Art 18. But it is to be observed that there is no corresponding Article to the opposite effect which permits the court to override the provisions of Art 12 when it is in the interests of the child to do so. The inclusion of any such Article would be incompatible with the fundamental policy of the Convention.

I am, therefore, inclined to the view that by 'take into account' is meant to 'give effect to in the absence of countervailing factors'. I am not myself persuaded that there is any room for a child who is old and mature enough for his views to be taken into account and yet too young and immature for them to carry any weight -- still less to prevail -- unless supported by other factors which indicate that his interests would best be served by refusing to order his return. It seems to me that either the child must be old and mature enough for his views to prevail in the absence of countervailing considerations or he is not, and must be returned.

In the light of the policy of the Convention, I find it difficult to accept that there can be an intermediate situation in which the child's views, although insufficient in themselves to be given effect to, are nevertheless sufficient to let in evidence factors which militate against his return, evidence of which would otherwise necessarily be disregarded. I tend to the view that such evidence is relevant only in a case where the child is bound to be of sufficient age and degree of maturity for his views to be taken into account, and the deprived parent nevertheless invokes Art 13 to tender evidence in order to attempt to persuade the court to override his objections because it is in the interests of the child to do so. It is, however, not necessary to express a concluded view on this question, since on the view I take of the evidence it does not arise. Like my Lord, I am satisfied that there were no countervailing factors which militated against the return of the children.

I turn to consider the judge's approach to the wishes of the children. He thought it was a borderline case. He recorded the evidence of the two child psychiatrists that the children, who were aged 7 1/2 and 6, were of average maturity for children of their age. He allowed himself to be influenced by the fact that the parents themselves, in the 'Joint Parenting Agreement', had apparently formed the opinion that the children were already mature enough for their views to be determinative on the question of custody. In my judgment, the terms of the 'Joint Parenting Agreement' were of no relevance to the question which the judge had to decide, for three reasons. In the first place, there was, as I understand it, no evidence of the circumstances in which the agreement was entered into; for all the judge knew, the provision in question may have been the price the father had to pay to obtain custody. It certainly does not follow that he believed that the children were of an age and degree of maturity which made it appropriate for their views to be determinative. In the second place, even if the parents did believe this, they were not necessarily right, and the question, in any event, is not one of fact but one of judgment for the judge. In the third place, the agreement was intended to be of long-term duration. It is evidence that the parents recognised the obvious fact that the time would come when the children were old and mature enough for their wishes to be respected. It does not follow that they believed that that time had already come.

In my view, this was not a borderline case. The children were ordinary little boys, aged 7 1/2 and 6 years, of average maturity for boys of their age. Their views were firmly held and based on reasonable grounds. But I cannot accept that, given their age and maturity, it was appropriate to take their views into account on the present question. It follows that, in my judgment, the court was bound to order the boys to be returned to Illinois.

Discretion

This makes it strictly unnecessary to consider whether if the judge had a discretion to refuse to order the return of the children he exercised that discretion properly. But I am quite satisfied that he did not. He did not accept the mother's contention that the children would be placed in an intolerable situation if they were returned to Illinois. He decided not to order their return for one reason only. He considered that, if the mother applied to the court of Illinois, the court would be virtually bound, in view of the 'Joint Parenting Agreement', to

order the children to be returned to the custody of the mother, and so no doubt to Wales. He said that he knew of no ground on which such an order could be said not to be in the children's interests. Accordingly, he concluded that the appropriate course would be for the children to remain in Wales with their mother, at least for the time being.

In my judgment, in having regard to what he assumed would be the decision of the Illinois court, he was taking an irrelevant consideration into account - one, moreover, which has been vitiated in the event. Furthermore, in concluding that there were no countervailing considerations, he was plainly wrong. In my judgment, everything pointed to the return of the children. First, the children had lived in Illinois since 1990, that is to say, since they were 3 1/2 and 2. That was where their home was, and where their school and friends were. Secondly, as recently as March 1994, when the mother left Illinois to return to live in Wales, she had accepted that the children should live with their father in Illinois. Thirdly, they had been in Wales for only a few weeks and had never been there before. They came solely for the purpose of a summer holiday, and were due to be returned at the end of the holiday. Fourthly, and perhaps most Importantly, the fundamental policy of the Convention dictates that children should not be retained in circumstances such as these for the reasons my Lord has given but, on the contrary, that they should be returned to the country where they habitually reside and where the courts can decide their long-term future.

Against these considerations, the mother could point only to her lack of means and the difficulties which she would undoubtedly face in returning to Illinois and contesting the proceedings there. For my own part, I do not regard those considerations as outweighing the features which I have mentioned or even as being relevant. In my view, this is the clearest possible case for the summary return of the children. The judge's refusal to do so was, I think, incompatible with the policy of the Convention, and the mother's submissions and her reliance on lack of means to return to Illinois and contest the proceedings there would, if accepted, virtually render the Convention ineffective.

I agree that this appeal should be allowed and with the order which my Lord proposes.

SIR RALPH GIBSON: I agree that this appeal should be allowed, and that the order should be made as proposed by my Lord, Balcombe LJ. I also agree with the reasons for the decision given by my Lords, Balcombe and Millett LJJ, save that, with reference to the boys' objections, I agree with the approach to that issue explained by Balcombe LJ.

There are two matters to which I will refer. First, on the issue of the boys' objections to being returned, Mr Posnansky distinguishes between return to the country of the child's former residence and return to the care and custody of the applicant parent: there, he says, the boys object only to being returned to the father and that, within the facts of this case, is not within the Article.

I accept that there may be cases in which the distinction will be clear and decisive, for example, where return of the child to the country of former residence will not or need not result, pending the further decision of the competent court of that country, in the return of the child to the care and custody of the applicant parent. In many cases, however, usually as a result of lack of funds to make other arrangements, return to the country of former residence will, as a matter of certainty or probability, result in that return to the country of former residence having the consequence of the child being returned effectively at once to the care and custody of the applicant parent.

The words 'if it finds that the child objects to being returned' in Art 13 appear to me, as submitted by Miss Scotland, to direct the court's attention to the consequences of the child being returned in the circumstances of the particular case and to the nature and substance

of the objection expressed by the child. In this case I agree with the order proposed by my Lord on the assumption that the two boys will return to the care and custody of the father upon return to Illinois. The objection of the boys is, in fact, a strong preference on their part to remaining with their mother, and their preference, and the reasons for it, will be considered by the Illinois court in further proceedings. This objection, on the part of the boys, to being returned on the facts of this case can, in my judgment, be given little weight in the court's assessment of the proper order to be made.

Next, as to the point of acquiescence, it seems to me that the finding of the judge cannot be supported on the evidence before the court. In particular I find it impossible to accept that the father's letter of 28 August 1994 can be regarded as expressing or confirming his acquiescence of the retention by the mother of the two children. Miss Scotland described the letter fairly, in my view, as a statement by the father that he would do anything to the end of getting his boys back by getting all the family together again.

For my part, since the mother had no intention of agreeing to the plea of the father, and made her intention clear, I cannot accept that she could reasonably regard that letter as amounting to acquiescence on the part of the father in the retention by her of the two boys in Wales.

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