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[14/07/1993; High Court (England); First Instance]
Re S. (Minors) (Abduction: Wrongful Retention) [1994] Fam 70, [1994] 1 FLR 82, [1994] Fam Law 70

IN THE HIGH COURTS OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

14 July 1993

Wall J.

In the Matter of S.

James Turner for the father

Frank Moat for the Mother

Wall J.:

This case concerns the concept of wrongful retention under article 3 of the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 ("the Convention") which is incorporated into the law of England by section I of the Child Abduction and Custody Act 1985. The points for decision can be formulated in the following way. Are children unlawfully retained under article 3 when (1) they are brought to this country from their country of habitual residence by agreement between their parents with the intention that they will reside here for a fixed period; (2) both parents have equal parental rights and responsibilities under the law of the state of their habitual residence; (3) before the expiry of that fixed period the relationship between the parents comes to end and they separate; (4) one party returns to the country of his habitual residence and issues an application under the Hague Convention seeking the peremptory return of the children to that country; (5) The other party remains in England and asserts that both she and the children have become habitually resident here?

In the instant case both parties are Israeli citizens. They were married in Israel on 5 August 1985 and have two daughters, both born in Israel and now aged, respectively, nearly five and 15 months. Both parties had lived in Israel all their lives and neither child had been in EngLand prior to September 1992.

With one important exception, the relevant facts are not in dispute. Both parties are scientists. In 1992 the father was employed by the state of Israel in a research centre near Tel Aviv. During the course of that year he was offered the opportunity to come to England on sabbatical to carry out a research project. Paragraph 2 of his affidavit in these

proceedings, sworn on 29 June, states: "I discussed the sabbatical with [the mother] and we agreed we would travel to England with the children for a period of one year."

The father's case is that after this agreement had been reached the mother also secured a post in a laboratory in a hospital in the same area in order to pursue research. He exhibits to his affidavit two letters from the British Council, both dated 5 August 1992, which, so far as their terms and conditions are concerned and apart from essential differences in the nature of the scholarships specified in their opening paragraphs, are in identical terms. That to the father offers him a scholarship jointly funded by the Foreign and Commonwealth Office and the Anglo-Israel Association at the opto-electronic research centre in a university for a period of not more than 12 months starting from about October 1992. That to the mother offers her a jointly funded scholarship at the same university to study molecular aspects of problems in the central nervous system for a period of not more than 12 months, starting also in about October 1992.

The father was to be paid a stipend of L3,000 over six months. The mother was to receive a stipend of œ800 a month and fees not exceeding L3,000, plus the cost of travel from Israel at the beginning of the scholarship and back to Israel at its termination. The common parts of both letters contain the following relevant sentence:

"The purpose of the scholarship is that you should carry out in Britain the plan of studies agreed between yourself and the British Council and should then return to resume your career in your own country."

Each party also agreed to remain in Britain, not to accept any paid employment and to return to Israel at the conclusion of the scholarship.

The mother's case is that in 1992 she was finishing her Ph.D. thesis in Israel and that both she and the father were, in parallel, looking for research posts which would suit them. She says the reasons they decided to travel to England rather than anywhere else was because both found suitable posts with adequate finance offered by the British Council. The mother says that it was important to her to have at least two years attached to the university because of the nature of her work -- research into multiple scleroses -- and that, accordingly, she and the father agreed "that we should stay in England for a period of at least two years with an optional extension." She says that the father, accordingly, inquired of his employers about leave of absence without pay following the sabbatical year and was told this was likely to be agreed.

The mother exhibits to her affidavit a letter from the professor of clinical biochemistry at the university which states that the mother started at the university in November 1992: "for a period of one to two years with an optional extension." The letter goes on to state the mother has a research grant to support her work and expresses confidence that she will continue to receive financial support for her study.

I have, of course, not heard oral evidence but when the case was opened to me Mr. Turner, for the father, accepted that although the intention was that the family would come over for one year, it was not beyond the realm of possibility that they would have stayed longer. The parties arranged for their apartment in Israel to be let until the end of August 1993. The reason for the length of the letting, I was told, was that a longer let would have given the tenant different rights of occupation and I therefore draw no inference one way or the other from the length of the letting.

On 1 September 1992 the mother and the father arrived in England with the children. They then rented a property which, I was told by Mr. Moat, for the mother, was available for six

months but which could be extended to two years. On a number of occasions between November 1992 and April 1993 the father returned to Israel due to the terminal illness of his father. On one of these visits, between 28 December 1992 and 6 January 1993, the mother and the children accompanied him. On 22 April the father returned permanently to Israel and his father died some eight days later, on 30 April 1993.

The father says that on 18 November 1992 when he returned from one of his visits to Israel he noticed a significant change in the mother's attitude towards him and he says that in December 1992 the mother asked him to leave the house. It is common ground that he moved out on or about 24 January 1993 and went to live in alternative accommodation in the same locality which allowed him frequent contact with the children. On 11 April 1993 the father returned from one of his visits to Israel. He says that after that the mother refused to allow him to speak to the children and later changed her telephone number so that he could not do so. He says he has not seen the children properly since April 1993.

Also in April 1993 (the precise date is not clear from the documentation) the father commenced proceedings for divorce against the mother in Israel. I have not seen the documents in those proceedings but it is clear from an expert opinion from an Israeli lawyer, Mr. Mordechai Shorer, which the mother has produced in these proceedings, that they allege that the mother has been unfaithful to the father and was conducting a romantic relationship with another man. The mother does not deal with this allegation in her evidence and it is immaterial to the present proceedings.

What may, however, be of significance is that the mother has made an application in the Israeli divorce proceedings for maintenance for the children; further that on 16 June 1993 the rabbinical court in Rehovot accepted jurisdiction to deal with the question of the custody of the children and set 2 September 1993 as the date for the consideration of that issue. The court took jurisdiction on the basis that the habitual residence of the mother and the father was in Israel: "The couple went for a study year to the U.K. in order to return to Israel at the end of the year."

On 6 May 1993 the mother obtained ex parte interim residence and prohibited steps orders under the Children Act 1989 in the county court. She says that she did this following an incident to which the children's nanny deposes in an affidavit sworn on 13 june 1993, the effect of which was that the mother thereafter feared the father was attempting, unilaterally, to remove the children back t6 Israel.

Also on 6 May 1993 the father wrote to the mother from Israel by registered post. It is a very formal letter in the following terms:

"Re demand to return the girls to Israel

"Dear Madam,

"Further to our many prior conversations in the above matter hereby repeat and demand your immediate return to Israel, of the girls. As you know, the stay was within the framework of my sabbatical. With my return to Israel you are required by law to return with our daughters to Israel, which is our regular and permanent place of residence. Your failure to return the girls to Israel constitutes a breach of my custody rights over the girls and the breach of my rights of visitation with the girls. Furthermore. I demand that you permit me to have telephone contact with the girls in an orderly fashion until their return to Israel. The fact that you prevent me from talking with the girls constitutes mistreatment and is damaging to the girls, which is liable to cause them serious emotional damage. I hope that

you will act immediately in accordance with the above. I hope that the conflict between us will not cause you to continue to harm the best interests of the girls and to violate the law."

It does not appear that the mother replied to this letter and on 11 June 1993 the originating summons currently before me was issued by the father. It seeks, inter alia. the immediate return of the children to Israel on the ground that the mother is wrongfully retaining them in England in breach of the fathers rights of custody.

The mother's case on the facts is that the agreement between herself and the father is, as I have stated, that they would stay in England for a period of at least two years with an optional extension. She makes it clear that she regards the marriage as irretrievably broken down and expresses her clear wish to remain in England with the children. She says that she has settled and made a life in England. She makes a number of allegations against the father, which, like the father's allegations against the mother, are immaterial for present purposes.

The father's case on the facts as outlined is that at all material times the habitual residence of the children remained that of Israel and that the mother's unilateral decision to retain the children in England constitutes a breach of his custody rights under Israeli law. He submits that but for the mother's wrongful retention of the children, including her refusal to allow him to see them, he would be exercising those rights of custody. He therefore submits that the children have been wrongfully retained by the mother in England within article 3 of the Convention and that the court should order their immediate return to Israel.

The mother takes a number of points in answer to the originating summons but her main contention is that the Convention does not apply because her retention of the children in England is not wrongful. She says, as I have already stated, that, pursuant to the agreement originally made between the parties, she is entitled to remain in England with the children for, at the very least, a year from September 1992 and that her continued presence here with the children cannot be said to be wrongful before that period has elapsed. Alternatively, she says that the Convention does not apply because the father has no rights of custody under the law of Israel. In the further alternative, she says the Convention does not apply because the children are now habitually resident in England. If, however, contrary to those submissions, the Convention does apply she seeks to rely on the provisions of article 13(a), "Acquiescence," and 13(b), "Intolerable Situation."

To the mother's primary argument the father's response is that it was a condition precedent to the original agreement that the parties would bring the children to England as a family and remain here as such. Thus (he submits) the breakdown of the marriage and the refusal of the mother to contemplate a return to Israel vitiates the agreement and constitutes a wrongful retention within article 3.

Points arising in the case

1. Does the mother's action in refusing to return the children to Israel breach the father's rights at all, given the law of Israel as set out in the opinion of the Israeli expert. 2. Can there be a wrongful retention within article 3 when there has been agreement for the children to remain within the jurisdiction for a fixed term and one party requires the return of the children to the country of their habitual residence before that term has elapsed? 3. Has the habitual residence of the children altered since they came to England in September 1992? 4. If the Convention applies, is the case within either article 13(a) or (b) on the facts?

The purpose of the Convention

It is trite law but always important to remember what the Convention is designed to achieve. Article 1, which is not enacted into the domestic law but to which I am entitled to have regard, states that the objects of the Convention are, firstly, to ensure the prompt return of children wrongfully removed to or retained in any contracting state; and, secondly, to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states.

In the instant case, therefore, as in any other case to which articles 3 and 12 are said to apply, I am not determining the merits of residence or contact issues as between the parties. I am not determining where or with whom the children should live. I have to decide firstly whether or not the Convention applies and secondly, if it does, whether or not the children should be promptly returned to Israel in order for the courts of that country to decide with whom they should reside and where.

Wrongful retention

The decision of the House of Lords in In re H. (Minors) (Abduction: Custody Rights) [1991] 2 A.C. 476 makes it clear that to establish that a child has been wrongfully retained within article 3 the complaining parent must prove an event occurring on the specific occasion which constitutes the act of wrongful retention. Wrongful retention under the Convention is not a continuing state of affairs. Thus in the instant case the father must point to a specific event at a specific point in time which constitutes the act of wrongful retention.

Wrongful retention must in every case be an issue of fact. The mother's case on this point is that since wrongful retention has to be related to a specific point in time it cannot be said that she is wrongfully retaining the children at any point prior, at the very earliest, to 1 September 1993. Thus she asserts that by issuing his originating summons on 11 July the father has "jumped the gun" and the summons must inevitably fall to be dismissed. This proposition is at the heart of the case and must be examined carefully. I do so first by looking at the agreement between the parties.

There is an issue between the mother and the father as to precisely what the agreement between them was. For reasons which will be apparent later in this judgment, I do not think it necessary to express a concluded view on the precise terms of the agreement. It is sufficient for present purposes and for the way in which the argument for the mother was developed for me to hold that, on any view, the agreement was that the family would remain in England for one year from 1 September 1992. Both parties' contracts were to that effect and I was told that the the mother's immigration position is that she has the right to remain in England only until 31 October 1993, although she can apply for an extension. For the purposes of this judgment, therefore, I find as a fact that it was agreed between the parents that they would come to England for a period of at least one year.

The law of the state of Israel

Exhibited to the father's affidavit is an extract from the Israeli Capacity and Guardianship Law in an authorised translation from Hebrew prepared at the Ministry of Justice. Paragraphs 14 and 15 of chapter 2, "Parents and Minor Children," read as follows:

"14. Parents shall be the natural guardians of their minor children.

"15. The guardianship of the parents shall include the duty and the right to take care of the needs of the minor, including his education, studies, vocational and occupational training and work, and to preserve, manage and develop his property; it shall also include the right

to the custody of the minor; to determine his place of residence and the authority to act on his behalf."

Paragraphs 18 and 19 read as follows:.

"18. In any matter within the scope of their guardianship the parents shall act in agreement. The consent of one of them to an act of the other may be given in advance or subsequently, expressly or by implication, for a particular matter or generally. Either parent shall be presumed to have agreed to an act of the other unless the contrary be proved. In a matter admitting of no delay, either parent may act on his own.

"19. Decision of the court. Where the parents have reached no agreement in a matter relating to the property of the minor, either of them may apply to the court, which shall decide in the matter. Where the parents have reached no agreement in any other matter within the scope of their guardianship, they may together apply to that court, and the court, if it does not succeed in bringing about agreement between them and if it deems it appropriate to decide in the matter, shall either decide it itself or refer the matter for decision to whom it may think fit."

Mr. Moat, for the mother, produced an expert opinion written by an Israeli lawyer, Mr. Shorer, the relevant portion of which reads as follows. Having summarised the provisions of paragraphs, 15 to 19, which I have just read, he goes on to say this:

"If the parents are living apart, as is the case with the the [S] family, article 24 of the Competency Law stipulates as follows: 'In the case of the parents or a child who are living apart -- whether their marriage has been annulled, abandoned or broken off, or whether it still exists -- they may agree which of them will have the guardianship of the child, whether wholly or in part, which of them will maintain the child and what the rights are of the parent who does not maintain the child to have access to it. Such an agreement requires the endorsement of the court, and its ruling will be tantamount to a ruling of a court of law.' If the parents cannot reach an agreement as detailed in article 24, or if they reach an agreement but the agreement is not carried out, the court may -- pursuant to the provisions of article 25 ... stipulate the matters referred to in article 24 in what it perceives to be in the best interests of the. child -- except that children up to the age of six must remain with their mother unless there are special reasons for ordering otherwise. As far as the special reasons are concerned, they could include violence by the mother towards the child, mental illness in the mother, or if she is a drug addict or a prostitute, with no relationship with one man. In practice, the courts refer the matter to the local social services in the place where the children are located to investigate the qualifications of the parents and submit their findings to the court. In this way the court is able to obtain full details of the children's situation from professionals prior to making a decision. If we apply the provisions of the Competency Law to the [S] family it is evident there are two daughters, both of them below the age of 6 and one of them aged 1. It can safely be assumed that the district court, pursuant to the provisions of article 25 of the Competency Law, would stipulate that custody should go to Mrs. [S.]. Further to what has been stated above it is clear that the rabbinical court would give an identical ruling to the district court, acting pursuant to the provisions of the Competency Law."

Mr. Shorer then goes on in the following paragraphs of his opinion to set out the stipulations of the religious law and, pursuant to his analysis, states that these reach a similar conclusion. I do not, therefore, propose to read the balance of his opinion.

Mr. Moat sought to persuade me on the basis of this opinion that the mother's action in refusing to return the children to Israel could not constitute a breach of the father's rights of

custody since he had no such rights. Accordingly, it was argued, since the outcome of any application to the court in Israel would be that the custody would be awarded to the mother she, effectively, had sole rights of custody and, as a consequence, there was no breach of the father's rights.

In my judgment, this argument confuses two concepts, the rights of custody under paragraphs 14 and 15 of the Code and the practice of the court in resolving disputes between parents when they are unable to agree. The mere fact that in the event of a dispute between the parents the Israeli court would normally award custody of girls of the ages of these two daughters to the mother does not, in my judgment, affect the father's rights under paragraphs 14 and 15 of the Israeli Code. Thus, the mother's actions, in my judgment, in refusing to return the children to Israel and in denying the father contact with them -- if that is what she has done -- are capable of constituting breaches of his rights of custody under paragraph 15.

Is the mother's action in retaining the children in England in breach of the father's rights of custody, given the agreement that the children will remain in England, in any event for one year?

I have found this the most difficult aspect of the case. I was initially attracted to the proposition that where parents agree that children shall remain in England for a specified period there cannot be a wrongful retention until that period has elapsed. The mere fact that the relationship between the parents has come to an end cannot entitle one parent unilaterally to resile from that which has been agreed between them. The example which springs to mind is an agreement that children should visit a foreign country for a specific time, such as a school holiday. Clearly, a parent in such circumstances could not unilaterally change his mind and demand the return of the children before the term of the contract had expired.

Thus, if the mother's case before me were that she intended at the expiry of one year to return the children to Israel or were she to establish for the purpose or this argument that the agreement between them was that the children should be returned after two years and that she intended to return the children at the expiry of that term then it seems to me she would have a complete defence to the originating summons, either because her retention of the children was not wrongful or, under article 13(a), because the father had consented not merely to the removal of the children but, by necessary implication, had consented to their retention in England for a fixed term.

Mr. Turner accepted, as of course, he had to, that the removal of the children to England was not in breach of the father's rights and that he consented to it. Indeed, he submitted that the father was, in effect, exercising his rights by bringing the children to England with the mother. Mr. Turner submits, however, that the mother's refusal now to return the children at any point in the future and irrespective of the original agreement constitutes a breach of the father's rights even though she is retaining the children in England within the period originally agreed.

The question, in my judgment, thus becomes does the fact that the mother has stated her intention not to return the children to Israel at all mean that there is a wrongful retention as at the date that intention is either formed or when it is communicated to the father, even though the period in which she is entitled to retain the children in England has not yet expired?

In the absence of authority, my answer to this question might well have been "No." An intention not to return after a given date, which intention is capable of being changed should

not, in principle, render wrongful what has been agreed -- namely retention up to the date in question. However, on reflection, I have come to the conclusion that both the terms of article 3 and In re A.Z. (A Minor) (Abduction: Acquiescence) [1993] 1 F.L.R. 682 require a different answer.

Mr. Turner argues that the terms of article 3 are, in a sense, exclusive. Provided its terms are fulfilled the wrongful retention is established and extraneous factors do not fall to be considered. Thus, he says here that the mother's decision not to return the children to the state of Israel is a breach of the father's rights of custody, that the children are habitually resident in Israel (notwithstanding their presence in England) and that at the time the mother announced her intention not to return them the father would have been exercising his rights but for her refusal to allow him to see them and her expressed intention not to return the children to Israel. He thus says that the terms of article 3 are fulfilled and the court is thus bound to order return under article 12.

Mr. Turner further submits that article 13(a) cannot apply because, although there was an agreement to the removal into England, the Father plainly does not agree with the mother's retention of the children in England and since retention under the Convention refers to a fixed point in time and since, in the context of this case, that retention can be dated by the mother's announcement of her decision not to return the children, article 13(a) cannot apply since the father has neither agreed, nor by his prompt action in taking proceedings, acquiesced.

In In re A.Z. the child was habitually resident in Germany. Mother brought him to England on a temporary basis with the father's agreement and then handed him over to an aunt. The father agreed that the child should remain with the aunt until he, the father, was able to come to England at Christmas. On 19 December the aunt applied ex parte to the county court for residence add prohibited steps orders which were granted. Booth J. found that there were two points in time when the child was wrongfully retained in England. She said:

"First, there is the question whether there was there a wrongful retention. There are two points of time, in my judgment, when Z. was retained in this country wrongfully. Wrongful retention for the purpose of the Convention means retention 'in breach of the rights of custody attributed to a person, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention.' The rights of custody, according to the German civil code, vest in the mother and father, they being married. The first point of time when Z's retention in this country was, in my judgment, wrongful was at the point that the mother decided not to return to Germany; that is, in November 1991. That was a unilateral decision taken by her. It was in breach of the father's custody rights because she did not intend to return to Germany, in breach of the agreement that they had previously come to. The mother decided, without consultation with the father, that Z should stay with [the aunt and her husband]. The mother says that had the father come over to this country and at that point required or demanded or asked that Z. should go back to Germany with him, she would not have objected and neither would any of her family. But it seems, to me that by her unilateral decision to keep the child in this country herself and not return there was a wrongful retention. The second, and perhaps the stronger, of the two points of time when the retention can be considered to be wrongful, was on 19 December 1991 when, on the ex parte application to the Oxford County Court, the aunt obtained, first, the residence order (that Z. should reside with her until 17 January) and, secondly, the prohibited steps order (that he should not be removed from the jurisdiction). It was a unilateral decision to make that application and it was not taken in consultation with the father. The most that the father had done was to agree that until he could come to this country Z. should remain with [the aunt and her husband] and not live

with the mother. He had agreed to nothing else. He certainly had not been asked, nor had he agreed, to the prohibited steps order being obtained."

In the Court of Appeal Sir Michael Kerr commented on this passage in the following way [1993] 1 F.L.R. 692, 689:

"Without deciding the point, particularly since it has not been pressed in argument, I am doubtful about the first ground on which the judge relied. It seems to me that [he uncommunicated decision which the mother took in her own mind in November 1991 not to return the boy on 21 January 1992 could hardly constitute a wrongful retention in November 1991. It was at most an uncommunicated intention to retain him in the future from which she could still have resiled. But on balance I am driven to agree with the judge on the second ground, which she recognised to be the stronger one, although it seems odd that an otherwise lawful and unconcealed application to a court can constitute a wrongful retention. However, the unusual nature of this act as constituting a wrongful retention appears to me to have some relevance to the question of acquiescence, as mentioned below."

It is to be noted that, at p. 684, Butler-Sloss L.J. took the view that Booth J. was "entirely justified in her conclusions under article 13 that the child was wrongfully retained." I query whether or not the report has misprinted article 13 for article 3.

I confess that I initially shared the misgivings expressed by Sir Michalel Kerr. If a parent, pursuant to an agreement that a child may live with him for a given period, fears unilateral action by the other parent it seems to me very hard to suggest that an application to the court designed to protect the presence of the child for the agreed period constitutes an act of wrongful retention. Thus, if the mother in the instant case applied for prohibited steps and residence orders for the sole purpose or protecting the presence of the children within the jurisdiction until 1 September I would find it difficult to hold that to be an act of wrongful retention, alternatively, if it was, that the father had not consented to the retention until 1 September under article 13(a).

However, it seems to me that where a parent, as here, announces as part of her case that she does not intend to return the children to Israel at all she can no longer herself rely on the father's agreement to the limited period of removal or retention as protecting either under article 3 or under article 13(a). As Mr. Turner puts it, she cannot have the benefit of the agreement without the burden. Equally, as an issue of fact, it seem to me that the decision which precedes the announcement, even if not communicated to the father, must be capable itself of constituting an act of wrongful retention.

I therefore find that, by announcing her intention not to return the children to Israel at all and by asserting that she and the children have acquired habitual residence in England, the mother has wrongfully retained the children in England as at the date of that announcement. On the facts, of this case the statement in her affidavit that she has settled and made a life in England is evidence of a previous determination to retain the children in England, which is capable of being fixed in time and which, whilst there is no direct evidence of when it was formed, I fix in time prior to the filing of the originating summons and upon or shortly after receipt of the letter from the father of 6 May 1993.

It follows, in logic, that the father has neither agreed in advance to the children remaining in England beyond 1 September, nor, plainly, has he acquiesced. I therefore find a wrongful retention within article 3.

Habitual residence

I heard a great deal of argument on this point and was referred to a number of the cases on it. I am, however, satisfied that the issue can be resolved shortly. The retention can of course only be wrongful if the children were habitually resident in Israel immediately before they were wrongfully retained in England, I am in no doubt at all that the habitual residence of the children remains that of Israel. Even if, which must be doubtful, the mother has herself lost her habitual residence in Israel, it seems to me plain that where both parents have equal rights of custody no unilateral act by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody. In my judgment4 the matter is concluded on this point by the observations of Lord Donaldson of Lymington M.R. in In re J. (A Minor) (Abduction: Custody Rights) [1990] 2 A.C 562, 572.

Article 13

Mr. Moat sought to argue on the basis of paragraph 16 of the mother's affidavit that there was a grave risk that to order the children's return would expose them to physical or psychological harm or otherwise place the children in an intolerable situation. Paragraph 16 reads as follows:

"[The older daughter] is very well settled here. She speaks fluent English with a nice British accent. She has many friends at school and at home. She is peaceful and enjoys going to school and living in England. I am afraid that she will get to Israel and will be exposed to bombs and terror which is all part of life in Israel. She will also have to serve in the Israeli army. My biggest concern of all however is that my husband will put my daughters into a very religious boarding school. There are my many places like this in Israel and children in those schools appear to disappear from one or another of their parents, all in the name of God. It is impossible to trace them and even the Israeli police are unable to help when such things happen. These events happen in Israel from time to time and there have been incidents when such things have occurred following bitter marriage breakdowns."

In my judgment, that paragraph does not even begin to make a case under article 13(b) and is, moreover, in contradiction to the evidence of the mother's own expert, which is, that the custody of children of the ages of these is likely to be granted to the mother.

It follows, in my judgment, that the father has made out his case under article 3, that none of the exceptions under article 13 apply and that the children must be returned "forthwith" under article 12. The children will of course remain in their mother's care until such time as the court in Israel orders differently, if it does. Had I discretion in the matter I would have ordered that the children be returned to Israel not later than 2 September 1993. Whilst I have no power, as I understand it, to specify what "forthwith" means, I hope that the father will recognise that an orderly return of the children in their mother's care to Israel for the Israeli court to decide their future is in their interests and that peremptory action is likely to be unsettling for them. I therefore hope that since the father has now succeeded in establishing the point of principle upon which he brought the originating summons the parties will negotiate a civilised timetable for the children's return to Israel, pending any further decision by the Israeli court as to where they are to live.

Order Accordingly. No order for costs save legal aid taxation.

Leave to appeal

Thursday the 9th Day of September 1993

In the Court of Appeal, Appeal No FAFMI 93/0990/F

On Appeal from the High Court of Justice, Family Division, Principal Registry, CA 114 of 1993

Before Mr. Registrar Adams, Registrar of Civil Appeals

Between

ES, Plaintiff

and

IS, Defendant

Upon reading the Notice of Consent dated the 8th September 1993 signed by the solictors for the Plaintiff and for the Defendant, by consent, IT IS ORDERED:

1. That the Defendant's appeal from the order of the Honourable Mr. Justice Wall dated the 14th day of July 1993 be dismissed.

2. That the costs of the Plaintiff and of the Defendant be taxed in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989.

By the Court.
