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[27/10/1992; High Court (England); First Instance]
A. v. A. (Child Abduction) [1993] 2 FLR 225

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

27 October 1992

Rattee J

In the Matter of A.

Robin Spon-Smith for the father

Clare Renton for the mother

RATTEE J: This is an application by a father for an order under the Hague Convention on the Civil Aspects of International Child Abduction 1980 insofar as that Convention is incorporated into English law by the Child Abduction and Custody Act 1985. The order sought is for the return of four children to Australia, where the father lives. The mother and the father are Mauritian by origin. They married in July 1979 in England. The only evidence I have before me on this application is in the form of affidavits and exhibits thereto. I have heard no cross-examination, although counsel for the mother involved in the case in fact tendered her client for cross-examination on behalf of the father, but counsel for the father declined to cross-examine her.

However, it is clear on such evidence as is before me that the marriage between the applicant father and the respondent mother of the four children concerned was one punctuated by some violence, to the extent that on repeated occasions the mother, as I shall call the respondent, left the father, as I shall call the applicant, although, also on repeated occasions, there were reconciliations between them following such temporary separation.

In 1980 the mother and the father set up home in Paris, where the father had a job, and the three eldest children concerned in this application were born in France. They are V, who was born on 27 October 1982, so that it is her tenth birthday today, E, who was born on 13 September 1984, now 8 years old and J, born on 6 November 1986, now nearly 6 years old.

In December 1987 the mother and the father came to England to live and the youngest of the four children, L, was born in England on 16 March 1988, so she that is now 4 1/2.

The father has a brother living in Australia. In 1987 the father visited his brother in Australia, but returned after that visit and the parties continued living in this country.

In February 1990 the mother started divorce proceedings against the father on the grounds of his unreasonable behaviour and at about the same time she fled from the father's home, together with the children, and took up residence in hotel accommodation provided by a local authority. She started proceedings for non-molestation injunctions and eventually orders were made by the court, including an order giving her interim care and control of the children.

Those divorce proceedings, I am told, are still in being, although no further steps have been taken, so far as I am aware, pursuant to them. In fact there was another reconciliation between the mother and the father on 15 June 1990, after the mother had been for some 3 or 4 months in the local authority hotel accommodation.

In July 1990 the mother and the children all went to Australia for a month's holiday. Apparently the father had mentioned previously the possibility of the family emigrating to Australia, but the mother had said, according to her evidence (and I am not in any position to doubt the veracity of this on the present state of the evidence), that she did not want to go to Australia to live permanently. In fact the father applied for immigrant visas for the whole family, which were necessary to enable the family to take up residence in Australia.

The mother and the children came back to this country in September 1990, after their holiday trip to Australia and unfortunately the marital difficulties between the mother and the father continued, with a further separation and a yet further reconciliation in February 1991. The mother, the father and the children then lived together in the council house in Hainault in the London Borough of Ilford.

A few weeks after the latest reconciliation, the father's application for immigrant visas, to enable the family to go to Australia, was granted. Those visas apparently had to be used, if at all, by 15 February 1992 otherwise they would have expired by fluctuation of time. In fact on 28 November 1991 the whole family went to Australia, that is to say, the father, the mother and the four children.

The mother denies that at that stage, or indeed at any stage, she had made any decision to settle permanently in Australia. While the family were out there they stayed in fairly cramped conditions, first in Melbourne and then later in Sydney, where they moved when the father found it difficult to get a job in Melbourne.

In early December 1991, that is very shortly after they had first gone out to Australia, the mother and the two youngest children returned to this country, apparently to arrange for the furniture in the former family home in Hainault to be shipped out to Australia.

Apparently the mother kept on the tenancy of the Hainault house, which I think was in her name, because she says she thought that the family might indeed not settle permanently in Australia and she wanted to keep the house in Hainault as accommodation in this country to which she could come if she decided she did not want to stay in Australia.

The father, while accepting that she kept the tenancy of the Hainault house for a time, denies the mother's averred motive for keeping it. He says that in fact she kept it for fraudulent reasons, in particular because she wished to go on drawing child benefit as though she was still a resident of this country. Be that as it may, the fact is that the house in Hainault was kept for a time but subsequently had to be abandoned when it came to the knowledge of the landlord local authority that the mother was in fact no longer living in the property.

So, as I have said, the mother returned to this country with the two younger children in December 1991 and arranged for the furniture from the Hainault house to be shipped out to

Australia. In January 1992 she returned with the two youngest children to Australia, having carried out her proposed shipment of the furniture. It seems clear from the evidence of both parties that at some stage around this time the father and the mother agreed that the whole family would return to the UK in October of this year, 1992, on the occasion of the wedding of a sister of the mother.

The mother maintains in her evidence that both she and the father regarded this planned return to England as offering an opportunity for them to reassess their long-term plans to settle in Australia, but the father denies that.

After the return in January 1992 of the mother and the two youngest children to the father and the other two children in Australia marital difficulties between the mother and father continued and became indeed, I think, aggravated by the cramped and unsatisfactory conditions in which they were living in Australia. Things got so bad that on 7 July 1992 the mother and all four children went and took up residence in a women's refuge in Sydney, Australia, leaving a letter by the mother telling the father that she really could not stand his treatment of her any longer. The mother and the children stayed in the refuge for about a week, until on 15 July 1992 they all came to England, where they have been ever since.

On the same date, 15 July 1992, the father applied to the relevant Australian court and that court granted an injunction against the mother removing the children from the jurisdiction of the Australian court. In fact that injunction was too late, in that by the time any effect was able to be given to it the mother and the children had already left Australia and come to England.

On 24 July 1992 a solicitor instructed by the father in Australia apparently gave him advice about rights he might claim to exercise under the Hague Convention on the Civil Aspects of International Child Abduction 1980 and on 11 August 1992 the father instructed his Australian solicitors to prosecute an application under the Hague Convention for the return of the children to Australia. Those instructions culminated in the issue of the originating summons in the present proceedings now before me which was issued on 10 September 1992.

On 30 September 1992 Cazalet J directed that there should be a report made by a court welfare officer on the question of the children's own wishes as to their return to Australia, having regard to the fact that it had become apparent that the mother was seeking to rely upon, amongst other provisions of the Convention, a provision to which I shall come in due course in this judgment, which in essence requires the court to consider the wishes of the children concerned in the case of children of sufficient age and maturity to have such wishes taken into account.

The court welfare officer interviewed all four children although, having regard to the ages of the children, very sensibly the welfare officer only canvassed the question of their views as to the suggested return to Australia with the two elder children.

There is before me a report made by Mrs Russell, the court welfare officer, a substantial part of which I think I should read. Commencing at para 5 of that report the court welfare officer says this:

'5. V and E (that is the two eldest children) are both very intelligent and articulate. The children told me that their parents had had many rows and that it was so bad at one time that they had to go into a refuge.

6. They liked to think that their parents would stay together. V, particularly, said her father was very short-tempered and that he had not talked to any of them for nearly 11 days before

they left Australia. This had made her very angry and she was not surprised or worried when her mother told her they were returning to England. Both these little girls see that their Mother is not happy.

7. They had all been quite happy going to Australia; they enjoyed the excitement and the change. They felt very definitely English, so it was good to come home again. They were delighted to see their vast extended family.

8. In London, besides their maternal grandmother, are the mother's seven sisters and one brother, their partners and about fifteen cousins.

9. [The father] apparently has a mother and two sisters in London, he has a brother in Melbourne and he lives in Sydney.

10. The extended family is extremely important to the children and it has almost certainly protected them from some of the matrimonial conflict.

11. When I asked V and E whether they thought their father would look after them they laughed and giggled. When it sunk in that there was a possibility they may have to return to Australia they became extremely worried.

12. Both children told me they could not live anywhere in the world without their mother but could equally live anywhere with her.

13. V said that J and L were extremely attached to their mother but that if Daddy had a favourite it might be J because he is a boy.

14. V told me that she felt very sorry for her father because she knew he did not like to be so far away from them, so she had written to him to reassure him that she wanted to see him. She hoped that they could have holidays with their father.

15. V and E both state clearly with understanding that they will not leave their mother and go to Australia. They did not think anyone could be that cruel. I felt less than honest when I tried to reassure them in a general way.

16. I think it would cause the children great distress to return to Sydney. They certainly say with feeling that it would. If the father lived in Canterbury the court would give great weight to their views. In this particular set of circumstances the children's interests cannot be served by using different criteria because the father is in Sydney. There was a real possibility that E's and V's relationship with their father might be damaged by returning them against their express wishes.

17. I do understand there are other legal considerations to be argued. These issues are, however, quite separate from the welfare principle and wishes of the children.

18. In terms of welfare the court should know that the children are well-housed with their mother in a four-bedroom council house. All the children are at school in institutions they like and have settled in with ease.'

In that factual context the father seeks an order for the return of the children to Australia under Art 12 of the Hague Convention, as I shall call it. That article provides, so far as material, as follows:

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

Article 3, to which reference is made in Art 12, is in these terms:

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

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

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

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

Now it is accepted on behalf of the mother that the removal by the mother of the children from the joint custody of the father was in breach of rights of custody attributed to the father by the relevant Australian law because under s 63(f) of the relevant Family Law Act each of the mother and the father had, prior to the mother's removal of the children from Australia, joint custody of those children.

However, it appears from Art 3 of the Convention that for the relevant removal of the children to be wrongful so as to oblige this court to order their return to Australia under Art 12 the removal has to have been in breach of rights of custody under the law of the State in which the child or children was or were habitually resident immediately before the removal or retention of them.

It is contended on behalf of the mother that in fact none of these children was habitually resident in Australia, whether in New South Wales or any other part of Australia, at the time of the removal. Either, says the mother, they were then habitually resident still in England or they were not habitually resident anywhere. She says that whatever the true analysis of their habitual residence, they were not habitually resident in any part of Australia.

So that gives rise to the first issue which is being argued before me because, if the mother is right and the children were not habitually resident in Australia immediately before the mother removed them from there, then of course their removal was not wrongful within the meaning of Art 3 of the Hague Convention, and not only is this court not obliged under Art 12 to order their return to Australia but none of the provisions to which I referred and shall refer in the Hague Convention are applicable at all. The husband depends for success in his claim for an order under the Convention on establishing that immediately before the removal from Australia by the mother, the children were habitually resident in Australia and in particular in Sydney. So, as I have said, that is the first issue between the parties.

Other issues arise from the provisions of Art 13 of the Hague Convention. That article, so far as material, provides as follows:

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

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

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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

On behalf of the mother it is contended that if she fails on her first argument that the children were not habitually resident in Australia at the relevant time, with the result of that failure being prima facie an obligation on this court under Art 12 to order the return of the children to Australia, none the less the court, in the circumstances of this case, has a discretion not to order the return of the children by reason of one or other of the provisions of Art 13.

The first provision of Art 13 relied upon by the mother is that which gives the court discretion not to order the return of the child if the person having the care of the child at the time of the removal or retention subsequently acquiesced in the removal or retention. In other words, in the facts of this case the mother says that the father subsequently acquiesced to the removal of the children from Australia with the result that the court has a discretion not to order the children's return.

Alternatively, the mother contends that it is clear from the court welfare officer's report, part of which I have read, that in the case of the two elder children, each has attained the age and degree of maturity at which it is appropriate to take account of his or her views and each objects to being returned as sought by the father. Therefore on that second ground, says the mother, the court has a discretion not to order the return of the two elder children, and if the court does not order the return of the two elder children the mother contends that to order the return of the two youngest children, without their elder siblings, would place each of the younger children in an intolerable situation within the terms of Art 13(a) and therefore give the court discretion by virtue of that article not to order the return of the younger children.

I should say that the mother does not contend that the first limb of Art 13(b), that is the limb that refers to a grave risk that the child's return would expose the child to physical or psychological harm, is relevant in this case.

The husband contends, in essence, that each of these children was habitually resident in Sydney before they were removed by the mother, thereby giving rise to a right in the father to claim an order for their return under Art 12 of the Convention and contends that he did not acquiesce in the children's removal, and that I should not take account of the views expressed by the elder children in terms of Art 13 in the circumstances of this case so as to refuse to order their return. It would then follow, says the father, there would be no good case for refusing to order the return of the younger children either.

I must record in rather fuller detail the mother's case on each of the issues which I have outlined: first, habitual residence. Miss Renton, on behalf of the mother, referred me, quite properly, to a decision of the House of Lords, Re J (A "Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor: Abduction: Illegitimate Child) [1990] 2 FLR 442. The leading speech in that case was delivered by Lord Brandon of Oakbrook, the other four members of the Judicial Committee sitting each agreeing with Lord Brandon's speech. At pp 578 and 454 respectively, Lord Brandon says in relation to the issue of habitual residence, this, and I quote:

'In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in Art 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any articular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with the settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that where a child of J's age'

- and I interpose to say that J in that case was 3 years old -

'is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.'

As I have already indicated, there is a conflict of evidence on the parties' intentions in relation to their residence in Australia in the early part of 1992. The mother says that she had not formed any definite decision about her future in Australia. She understood that the whole family was going to be coming back to England in October 1992 for her sister's wedding and that they would take that as an opportunity, having had a period in Australia, to reassess the position and decide for the longer term where they were going to make their home.

The father, while accepting in his affidavit evidence that there had been this planned trip to England for his sister-in-law's wedding in October 1992, says it was no part of his intention that it should be an opportunity to reconsider what he regarded as his settled intention to stay in Australia.

As I have indicated, I have heard no cross-examination on the affidavit evidence and I think in the context of this issue of habitual residence, which plainly is a question of fact and depends to some extent, at least in accordance with the text laid down by Lord Brandon, on the parties' intentions, that I should refer to a recent case in the Court of Appeal in which something was said by the court as to the way in which the judge at first instance has to approach the situation of a claim under the Convention where in fact, as often is the case, the judge has only affidavit evidence before him. That case is Re F (A Minor) (Child Abduction) [1992] 1 FLR 548. The relevant passage which I propose to cite is from a

judgment of Butler-Sloss LJ with which both the other members of the court agreed. That passage is to be found at p 553G and I cite:

'If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent.

Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it.

If, however, there are no grounds for rejecting the written evidence on either side the applicant will have failed to establish his case.'

As I have said, in the present case, Miss Renton, on behalf of the mother, indicated that her client, who has been present in court throughout the hearing, is perfectly willing to go into the witness-box and be cross-examined by Mr Spon-Smith on behalf of the father. In fact Mr Spon-Smith chose not to cross-examine her and, of course, even had I heard cross-examination from the mother I would have been left in a very unsatisfactory situation where I would have heard one party only and not the other, the father not himself being in court or indeed, so far as I know, in this country. In that situation I must bear in mind the words of Butler-Sloss LJ in the passage that I have just read from Re F.

The factual case put forward by Miss Renton on behalf of the mother for her contention that the children were not habitually resident in Australia immediately before 15 July 1992 is really, I think, to be summarised in this way.

Certainly it is clear that the whole family went to Australia on the strength of immigration visas in November 1991. However, that does not mean, says the mother, that she had decided, or indeed that either party had decided, at that stage, that they were going to take up long-term residence in Australia.

The mother points to the fact that she kept on her flat in Hainault for a period of some months after the family had gone to live in Australia, until the local authority became aware that she was no longer living in it, so that she had to give up the tenancy.

The mother and the father had agreed, says the mother, that the whole family was going to come back to England in October 1992 to attend the wedding of the mother's sister and although, says the mother, it is true that the family was all together in Australia from January 1992 until the beginning of July 1992, it was known to both parties throughout that time that not later than October 1992 they would all come back to this country and, says the mother, it was always in both parties' minds, certainly hers, that the return in October 1992 to England would be an opportunity to reassess the longer-term future for the family. The father, she points out, has at all times since he went to Australia, had an open return ticket enabling him to come to England at any time he chooses.

In essence, says Miss Renton on behalf of the mother, in that factual situation it is impossible for the court to be satisfied that the parties were habitually resident in Australia at the beginning of July 1992, having regard to the test of habitual residence expounded by Lord Brandon in the passage from his speech in the case of Re J, sub nom C v S which I have cited, in which his Lordship makes clear that some sort of settled intention is an essential

part of habitual residence. The mother says, by Miss Renton, that in effect she never had any settled intention to stay in Australia.

On that issue of habitual residence, Mr Spon-Smith, on behalf of the father, contends that the court must beware of applying too strict a test in treating habitual residence almost as if it were synonymous with domicile. He points to the fact that the family had, by the time the mother left the father taking the children with her, at the beginning of July 1992, been resident in Australia since their original arrival in November 1991, that is for some 7 to 8 months, except for the mother's brief return to England in December 1991 to January 1992 with the two youngest children for the purpose of arranging for the shipment of the furniture.

Mr Spon-Smith submits that, even if it be the fact that the parties had it in mind during their sojourn in Australia that the time might come when they might have a change of heart and decide to return to England or indeed go to some other part of the world, that possibility would not, until such time as it came to arise in reality, prevent the family being habitually resident in Australia in the meantime.

It does seem, in my judgment, plain from the speech of Lord Brandon to which I have referred in the case of Re J [1990] 2 AC 562 and in particular from the passage which I had already cited at pp 578H-579A, sub nom C v S [1990] 2 FLR 442 at p 454, that before a person can become habitually resident in a country he has to have formed some settled intention or other because Lord Brandon says:

'An appreciable period of time and a settled intention will be necessary to enable him or her to become so.'

That is to say, to become habitually resident in a new country. While his Lordship does not, in that sentence, spell out the nature of the settled intention concerned, it seems to me that he must be taken to be referring back to a sentence which appears at pp 578H and 454C respectively, in which he says that a person may cease to be habitually resident in country A in a single day if he or she leaves it with the settled intention not to return to it but to take up long-term residence in country B instead.

I consider that when, in the latter sentence, Lord Brandon refers to a settled intention being necessary to constitute habitual residence, what he meant was a settled intention to take up long-term residence in the country concerned. That being so, in my judgment, the mere fact of even 8 months' residence in Australia will not have made these children, or any of them, habitually resident there, or indeed made the father or mother habitually resident there.

In my judgment, notwithstanding the wife's contentions, the only proper view of the affidavit evidence which I can take is that in November 1991 not only the father but the mother as well did intend to take up long-term residence in Australia. That is not to say they intended to take up permanent residence there or that they did not have it in mind that at some time in the future they might form a different intention, but simply that when they went to Australia they went with the intention of taking up long-term residence there.

It seems to me, with great respect to Miss Renton's submission to the contrary, that the fact that the mother came back to England in December 1991 for the express purpose, which she executed, of arranging for the furniture from the former family home in Ilford to be shipped out to Australia is quite inconsistent with the proposition that at no stage prior to the mother's leaving the father in July 1992 had the mother formed any settled intention to take up long-term residence in Australia.

While of course I recognise, as I have already indicated, that I am under the disability in making findings of fact of not having heard the parties in the witness-box, but, doing the best I can on the affidavit evidence, it seems to me that on the balance of probabilities, within the meaning of the test advocated by Lord Brandon and agreed to by other members of the House sitting with his Lordship, on 15 July 1992, when the mother removed the children from Australia, each of those children was habitually resident in Australia.

It follows, in my judgment, that the mother's objection in limine to the father's application on the grounds that he cannot satisfy the test of wrongful removal in Art 3 of the Hague Convention fails and prima facie I am obliged, under Art 12, to order the return of the children to Australia, unless I have some discretion which I can properly exercise to the contrary by reason of the provisions, or one of them, of Art 13 of the Convention.

That, of course, brings me on to the second of the issues which I have mentioned, which is acquiescence. If the true view of the evidence is that the father, at some stage after the mother had removed the children from Australia, acquiesced in that removal, the result is that the court has, by virtue of Art 13, a discretion not to order the children's return to Australia.

In her submissions on the question of acquiescence Miss Renton, on behalf of the mother, referred me, first, to the decision of the Court of Appeal in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, in support of the proposition that acquiescence need not be a continuing state of mind on the part of the person acquiescing but that acquiescence is a once for all event, if it occurs at all. I think all I need do for this purpose, by way of citing from Re A, is to cite the first holding in the headnote (as reported at [1992] 2 WLR 536) which appears to be an accurate representation of the ratio of the court's decision and that says this:

'Held, allowing the appeal, Balcombe LJ dissenting, that "acquiescence" within the meaning of Art 13(a) of the Convention required informed acceptance by the aggrieved party of the infringement of his rights and might be signified either by express words or conduct on his part, which the other party believes, or by silence or inaction in circumstances where different conduct might reasonably have been expected; that acquiescence was not a continuing state and once it had occurred Art 13(a) operated to remove the court's obligation under Art 12 to order the children's return forthwith.'

Miss Renton next relied for further authority on the meaning of acquiescence in the context of Art 13 on a subsequent decision of the Court of Appeal, not, as I understand it, yet reported, but of which a transcript is before me, a decision given on 29 July 1992 by a division of the Court of Appeal comprising the Vice-Chancellor, Butler-Sloss LJ and Sir Michael Kerr [see Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682]. The lead judgment was given by Butler-Sloss LJ and in the course of it the Lord Justice, when commenting on the decision of the judge of first instance from whom the court was hearing the appeal on the question of acquiescence, said at pp 686-7:

'I do not agree with the judge nor with the argument of Mr Ritchie that in order to acquiesce it must be shown that the applicant had specific knowledge of the Hague Convention. The Master of the Rolls in his judgment to which I referred earlier' [that was his judgment in Re A (above)] 'continued: "in each case (consent or acquiescence) it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent, or as the case may be, acquiescence. Any consent or acquiescence must of course be real. Thus, a person cannot acquiesce in a wrongful act if he does not know of the act or does not know that it is wrongful. It is only in this context, and in

the context of a case in which it is said that the consent or acquiescence is to be inferred from conduct which is not to be expected in the absence of such consent or acquiescence that the knowledge of the allegedly consenting or acquiescing party is relevant and to use the words of Thorpe J, 'the whole conduct and reaction of the husband must be investigated in the round'."'

Butler-Sloss LJ goes on:

'Both the Master of the Rolls and Stuart-Smith LJ refer to the necessity for knowledge of the facts and that the act is wrongful. They did not take the further step of the necessity of knowledge of rights under the Hague Convention. In my judgment the judge misdirected herself, in stating that "acquiescence has to be done in the knowledge of rights that have been breached and rights that can be enforced".

That statement goes too far. If a father knows that his son has been retained in another country against his wishes and he wants him back and has the capacity to and is able to seek legal advice as to what proceedings he might be able to take, the factual situation has arisen upon which he may objectively be considered to have sufficient knowledge either to consent or to acquiesce in the situation which has occurred.'

A little lower down, at p 687F, Butler-Sloss LJ says this:

'Active acquiescence, which I believe this to be, has to be clear but it does not have to be an acceptance of unchangeable state of affairs. I see nothing incompatible with acquiescence to the continuance of a wrongful retention and an application to the Californian court for joint custody and care and control to himself which would take place at a later date. This father recognised the good care being taken of his son by the aunt and there was no urgency in his mind in changing the existing arrangements until either a court order or, as it turned out, a change of heart.

Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long-term acceptance of the existing state of affairs.'

Now in the context of those statements of the approach which the court has to make in considering the question of whether there has been acquiescence in a wrongful removal, Miss Renton submits that in the present case the father has, on the evidence, acquiesced in the removal of the children from Australia.

She relies in particular on certain letters written by the father after the children had been taken from Australia. Copies of those letters are exhibited to the mother's affidavits in this case. The first is a letter written by the father to the mother, we know not on what date. The only evidence as to date is that the mother says in her evidence that she received this letter at the end of July 1992 and the letter was apparently addressed to her at her sister's address in England.

In the course of that letter, which I do not propose to read at length, the father makes various comments on the mother's decision to take the children and leave him, in which he says at one point, having referred to the difficulties there had been between the parties, this, and I quote:

'Now the decision has been taken and it is about time and all. We wait what will happen next. My word is whatever is written in your book is, you can't change it. I knew that we were going to be split one day but I didn't expect that it was behind the door. Life would be

very hard for all our sakes in the beginning until we settle but in the end we will find it as if it is a blessing in disguise.'

A little lower in the letter he said:

'We were at the limit, as you said that you couldn't take it any more. I quite agree with you and I was the same. I am very sorry to tell you that as we got nothing between the two of us now that I'll have to get something out of my mind. I am not arguing. I don't feel like I felt before this time. We have been trying very hard and it hasn't worked, let's face it now, the kids got nothing to do with that situation. Please do let them write to me. I'm not giving you any order, I just want to let you know that you will carry all the blame in the future if you stop them stay in contact with me. Anyway I wish and I hope that you will meet new people and friends and even a companion to give you the happiness that you have missed for so long and if you are happy our kids will be happy as well. I don't have any bad feelings for you. Let's face the fact two people who can't live together wherever they go or whatever they do will never set a goal. So take it that way and life goes on. Whatever happens in our lives I will never forget you. I will still have some good feelings for you as you have participated in my hard times and you're the mother of our kids.

I wish you good luck for your new beginning and be happy with your life and remember that impossible doesn't exist and I leave the option open.

God bless you all.'

Then in a later letter dated 6 August 1992 to the mother, again sent to her in England, the father says this:

'Thank you very much indeed for giving V the opportunity to write to me, which I think is very nice from your side. This is not a letter to touch the weak part of yourself, it is only that compromising is one of the best things that can exist in life but unfortunately both of us hasn't taken it into consideration before but it is never too late. We're very far away to each other now. I told you and I will keep telling you that I don't have any bad feelings for you. Get rid of your colere, hope for the best, be positive with yourself, you will succeed. Things haven't finished between us. It is only that we don't live as husband and wife, I will be still the father of the four and you will be still the mother. I will always be in contact with them. We will have to face each other one day. Anyway it is up to you to respond my letter. If you need my help I'm very pleased to do it. I have a great respect for you and I can't pay you back what I owe you. Please let me know what will be your next step.

Good luck and God bless you.'

In a letter, a copy of which is exhibited to the mother's affidavit, written to the eldest daughter by the father dated 5 August 1992, the father says this:

'My dear big daughter V, thank you very much for your wonderful letter that I received yesterday. How are you and the others? Hope everything is going very well by your side.'

Then he goes on to tell what has been happening to him and at the end of the letter says:

'I end my message by telling you to be good and happy and I wish you great success in your future. I am willing to help you with pleasure. Write to me soon. Give my regards to everybody.

Lots of love and kisses from your Papa.'

That letter, the husband says in his affidavit, he wrote in the knowledge and belief that it would in fact be read by the mother.

Exhibited to a later affidavit from the mother is in fact what is an earlier letter written by the father to V dated 22 July 1992, in which he says:

'Hello, V, as you're a big girl now and I'm sure you will understand the situation, I don't want to lose contact with none of you. Please do write to me. I wish you good luck and happiness in your new beginning. I miss you all and give my love to everybody.

Big kisses from your Papa.

As often as I think of you, miss you.

The mother says, by her counsel, that by those letters, allied with the fact that the father gave the mother no reason to anticipate a claim for the return of the children until the issue of his originating summons at the beginning of September 1992, by which time the mother had had to arrange and indeed had arranged for the children's schooling in this country, the father plainly acquiesced in the mother's removal of the children from Australia.

The father, by Mr Spon-Smith, says no, not so. At most those letters can be construed as indicating acquiescence in the breakdown of the marriage between the mother and the father but not acquiescence in her removal of the children from Australia.

Mr Spon-Smith points to the fact that so far as the first letter from which I have cited was concerned, the one the mother said she received at the end of July 1992, it may be that letter was written indeed before the father, on 24 July 1992, received advice about his rights under the Hague Convention. While the authorities show, as Mr Spon-Smith accepts, that specific knowledge of the father's rights under the Hague Convention at the date of an alleged acquiescence is not necessary for the purposes of showing acquiescence, Mr Spon-Smith submits that I must take account in construing the relevant letters on the question of acquiescence of the state of the father's knowledge at the time he wrote the letters.

I accept that I have to take account of the state of the father's knowledge in construing the letters but, in my judgment, the letters as a whole, together with the fact that the father took no steps before the issue of the originating summons in September 1992, even to indicate to the mother that he was seeking the return of the children to Australia, constitute clear acquiescence by the father, albeit sorrowful acquiescence, in the children's removal from Australia.

In particular the last sentence of the first letter, the one received by the mother at the end of July 1992, says this and again I read:

'I wish you good luck for your new beginning, and be happy with your life and remember that impossible doesn't exist and I leave the option open.'

Even if that has to be taken as written without the full knowledge of his rights under the Convention, one looks at the later letter of 6 August 1992, by which time he plainly on the evidence had been advised as to his rights, and one finds in that later letter this:

'If you need my help I am very pleased to do it. I have a great respect for you and I can't pay you back what I owe you. Please let me know what will be your next step.'

In my judgment, looking at those letters as well as the letters written to V against the background that the father knew perfectly well that the mother had taken the children away from Australia and intended to remain with them in England, it is impossible to reach any other sensible conclusion but that he was accepting, although reluctantly, the mother's removal of the children from Australia as a fait accompli, as to which he made not one word of complaint in any of the letters written by him to the mother, prior to his originating summons.

Of course I accept, as Mr Spon-Smith submits, that a large part of the contents of the letters, and in particular the first one, indicate an acquiescence in particular in the breakdown of the marriage, but given that the breakdown of the marriage being acquiesced in was in the context that the mother had already taken the children away from Australia and that the father makes not one word of complaint about that, and indeed wishes the mother and the children good luck in their new lives, the letters seem to me to constitute clear acquiescence by him not only in the breakdown of the marriage but in the mother's removal of the children from Australia - the more so in the further context of the total failure on the part of the husband, at any time prior to the issue of the originating summons, by any other means to give any indication to the mother, notwithstanding that he had been in communication with her, of any intention on his part to seek the return of the children to Australia, knowing as he must have done that the summer during which the correspondence was taking place was a time during which plans had got to made, as a matter of some urgency, for the children's future schooling.

Accordingly, in my judgment the mother succeeds in establishing acquiescence within the meaning of Art 13 of the Convention. Although it is therefore immaterial, I should perhaps go on to consider the further alternative argument raised by Miss Renton on behalf of the mother, to the effect that even if there were no acquiescence, this court would have a discretion under Art 13 by reason of the fact that the two eldest children objected to being returned to Australia and have attained the age and degree of maturity at which it is appropriate to take account of their views.

I was referred by both counsel on that part of Art 13 to a recent decision of the Court of Appeal, S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. In that case and considering this part of Art 13, Balcombe LJ, delivering the judgment of the court, said at p 500:

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

And at p 501 his Lordship said this:

'Thus if the court should come to the conclusion that the child's views have been influenced by some other person, eg the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention. Thus in Layfield in the Family Court of Australia on 6 December 1991, Bell J ordered an 11-year-old girl to return to the UK, because he found that although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes would not be to remain in Australia per se but to remain with her mother, who had wrongly removed the girl from the UK to Australia. On

the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return.

Thus in Re M the court refused to order the return of three children aged 11, 9 and 8 to the USA.'

The effect of the court welfare officer's report, in my judgment, is that in the welfare officer's opinion, and I have no reason to dissent from it, each of the two elder children was of an age and maturity where one could elicit sensible views in relation to her wishes as to her return, and it is perfectly plain from the court welfare officer's report that each of the two elder children was very antagonistic to, and indeed fearful of, the prospect of being made to return to Australia without her mother. Each said that she could not live anywhere in the world without her mother but could equally live anywhere with her. The net result of that report, in my judgment, is not that these children or either of them was expressing any objection to going back to live in Australia, except in the context that the child believed that going back to Australia meant being separated from her mother.

In my judgment the effect of the court welfare officer's evidence, in the form of her report, is indeed that while each of the two elder children objects to being made to return to Australia, the objection to being made to return is, in the words of Balcombe LJ in S v S, 'because of the wish to remain with the abducting parent'. Balcombe LJ, giving a judgment of the court in that case, as I have already read, said that it was probable in such a situation that little or no weight would be given to the views that the child so expressed, and in my view it would not be right in the present case to refuse to return the two elder children or either of them because of the views expressed by each to the court welfare officer. Very understandably neither wants to be separated from her mother, but the objection expressed by them is not an objection, as Bell J put it in the Australian court, a case cited by Balcombe LJ, to returning to Australia per se, it is an objection to being separated from the mother. In those circumstances, had I not reached the conclusion, which I have, that the father has acquiesced in the wrongful removal, I would not have thought it appropriate not to return the children to Australia because of the wishes expressed by either of the elder two. That being so, the question of whether it would be placing the younger children in an intolerable situation if they were to be sent back without the elder children does not arise and I say nothing more in relation to it.

Thus, by reason of what, in my view, is the acquiescence of the father in the wrongful removal, I have a discretion in terms of Art 13 of the Convention not to order the return of the children to Australia and I have to consider how to exercise that discretion.

It is plain on the authorities that in exercising the discretion, I can, and indeed must, take into account the interests of the children concerned, but that I must also take very real account of the object of the Hague Convention and its incorporation into English law by the Child Abduction and Custody Act 1985, namely to ensure the speedy return to their country of habitual residence of children wrongfully removed therefrom.

The principle that has to be adopted was helpfully set out by the Court of Appeal in Re A (Minors) (Abduction: Custody Rights) (No 2) [1993] Fam 1, sub nom Re A (Minors) (Abduction: Acquiescence) (No 2) [1993] 1 FLR 396. This was a decision of the Court of Appeal from the rehearing by a judge of this Division, which had been directed by the Court of Appeal in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14. I need, I think, cite only the holding in the headnote at [1992] 3 WLR 538, which is in these terms:

'Held, dismissing the appeal, that once the father had acquiesced in the removal of the children within the meaning of Art 13(a), the court, in the exercise of its discretion under that article was entitled to take into account the interests of the children even though there was no grave risk to them if they were returned to their place of residence within the meaning of Art 13(b); but that under Art 13(a), the children's interests were not paramount and had to be balanced against the purpose of the Convention, which is the return of children wrongfully removed within the meaning of Art 3 and that, accordingly, the judge had rightly considered the children's interests when exercising her discretion under Art 13.'

In exercising the discretion which I have found that I have as to whether these children should be returned to Australia, I have to take account of their interests in the context of the likely effects of an order that they be returned to Australia and I have to balance that against the clear intention of the Hague Convention that children wrongly removed in the terms of Art 3 of the Convention should be summarily returned without the court normally exercising a discretion so as to keep the children in this country.

I have to take account of course, in relation to the children's interest, of the court welfare officer's report from which I have cited at an earlier stage of this judgment, which makes quite plain the elder children's fears of being returned to Australia without their mother. I have to take account also of the court welfare officer's findings to the effect that contact by the children with their wider family now in England is of benefit to them and indeed has perhaps acted as a significant protection of them against the emotional disturbance caused by the break-up of their parents' marriage, and I have to take account of the fact that the mother has expressed an inability herself to return to Australia to live with the children there because of her fear, on the one hand, of the father and, on the other, her fear of going to live again in a country in which she really has few friends and in which she would, she feels, be virtually alone in having to fight a battle over the future of her children with the father. Mr Spon-Smith submits that I should not take too much account of that aspect but should take the view that in reality, if I were to order the children's return, the mother would be likely to change her mind and decide to go back with them. I am not prepared to take that view on the evidence in this case.

It is quite plain that the mother has suffered from the violence within the marriage in the past to the point where she has left home with the children on more than one occasion to take up shelter in a women's refuge. Indeed, the father himself admits, in the course of some of his affidavit evidence, that he has in the past been violent towards the mother.

In my judgment, given that the children are now happily settled in this country with the mother in material circumstances as to which the court welfare officer makes no criticism, and have settled in school, and having regard to the mother's understandable fear of being made to return now to Australia with the children and the likely disturbing emotional effect that would have on the mother and therefore the children, in my judgment, even taking into full account the purpose and objects of the Hague Convention, it would be wrong for me, in the circumstances of this case, to order the return of these children to Australia. Accordingly, I shall exercise the discretion I have found that I have by virtue of Art 13 by refusing to make the order sought by the originating summons.

That decision is, of course, without prejudice to whatever may be the appropriate decisions to be taken by whatever court may in future be seized of the longer-term questions as to these children's future. On the present application I shall simply dismiss the application.

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