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[18/05/1990; Court of Appeal (England); Appellate Court]
Re S. (A Minor) (Abduction) [1991] 2 FLR 1, [1991] Fam Law 224

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

18 May 1990

Purchas, Butler-Sloss and Leggatt LJJ

In the Matter of S.

Ian Karsten QC and Tacey Cronin for the mother

Patricia Scotland for the father

PURCHAS LJ: I am authorised by Butler-Sloss LJ to announce that she agrees with the judgment that I am about to deliver.

This is an appeal from an order of Sir Stephen Brown P dated 10 May 1990 which ordered the return of a minor aged 12 1/2 years, to whom I shall refer as K, to the jurisdiction of the court in the State of Minnesota in the USA. By successive orders of the President and of this court, that order has been stayed until the determination of this appeal. The order was made upon the application on behalf of K's father by the Lord Chancellor. The respondent to the application, and the appellant in this appeal, is K's mother. The appeal has some unusual features which have raised issues not frequently considered at an appellate level under the provisions of the Child Abduction and Custody Act 1985 and the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25 October 1980, to which I shall refer hereafter as 'the Convention'.

Before coming to the Convention, I wish to refer to one matter which arose during the submissions of Mr Karsten, who appeared for the appellant mother, to which he returned in his reply, namely that, 'owing to the listing difficulties the President may not have had sufficient time properly to consider the matter'. The point is not taken formally in the notice of appeal and, as I read Mr Karsten's submissions, it was probably more as background than as a specific complaint about the conduct of the trial by the President. Mr Karsten, of course, was not present during the hearing of the application at first instance. As Miss Scotland pointed out to the court, the President had in fact made the following day, 11 May, available if required. It was not required, mainly because the President had spent a considerable time the night before in reading the main affidavits and the welfare report, and in considering the legal and treaty aspects of the case, a fact to which the President adverted in court at the commencement of the hearing. It would be deplorable if a custom at the Bar were to arise under which counsel came to confuse expedition with a lack of attention to the

problem on the part of the trial judge, basing this upon the actual time spent in court. Suffice it to say that there is no ground for disquiet of any kind on the ground that the matter was not fully considered and appreciated by the President.

I now turn to the 1985 Act. The preamble reads:

'An Act to enable the United Kingdom to ratify two international Conventions relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.'

Section 1 in Part I is headed:

'International Child Abduction

(1) In this Part of this Act "the Convention" means the Convention on the Civil Aspects of International Child Abduction' -

to which I have already referred

(2) Subject to the provisions of the Part of this Act, the provisions of that Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom.'

The particular articles in Sch 1, to which I shall shortly refer, start with art 3. Before doing so, I will mention s 3 of the Act by which the Lord Chancellor is nominated as the central authority under the Convention for cases involving England, Wales and Northern Ireland for the purposes of being both the requested State and the requesting State. The only other section to which I wish at this stage to refer is s 7, which provides that authenticated copies of decisions of foreign courts will be receivable, and copies purporting to be such receivable, unless it is shown to the contrary that they are not true copies.

Section 2 continues:

'(1) For the purposes of Articles 14 and 30 of the Convention any such document as is mentioned in Article 8 of the Convention, or certified copy . . . shall be sufficient evidence of anything stated in it.'

Part II of the Act deals with the recognition and enforcement of custody decisions. Schedule 2 imports the European Convention on Recognition and Enforcement of Decisions, concerning custody of children and on the restoration of custody of children, signed in Luxembourg on 20 May 1980. Schedule 2 contains the relevant articles of that Convention. It is not necessary for the purposes of this appeal to deal any further either with Part II or Sch 2 of the Act.

I propose at this stage to read Sch 1, which contains arts 3, 4 and 5, which are relevant to this appeal:

'Article 3

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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights . . .

Article 5

For the purposes of this Convention -

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'

I shall later be referring to other articles, namely 12, 13, 14 and 16. But for the purposes of this part of my judgment I can leave the recital of the Convention to those three articles.

I now turn to a sketch in some of the facts which are relevant to this appeal. The father is a Canadian citizen born in British Columbia, aged 44. The mother who was born in the State of Wisconsin in the USA, has citizenship both in the USA and Canada, and is aged 40. They were married in 1967 in the State of Wisconsin. After the marriage they moved immediately to Canada. Their first child, P, was born on 22 February 1969. K, with whom this court is concerned, was born on 3 November 1977. P has kept in touch with his mother and the family. He is, of course, now an adult and, I believe, serving in the armed forces of the USA.

In August 1981 the family moved to Minnesota from Canada. In January 1982 the mother and the children left the father, returning to Wisconsin to live with her parents. On 8 October 1982, proceedings took place in the District Court, Family Division, in the County of Washington, in the State of Minnesota. These were for the dissolution of the marriage in which the father was the petitioner, and I turn to the document which would appear to be a copy of the formal court document, it is with the papers and it refers in its introductory paragraphs to this:

'. . . the parties hereto entered into an oral marital termination agreement which was dictated into the record, allowing the petitioner [the father] to proceed ex-parte'.

By Article IX of the court document it is recorded:

'That [the father] and [the mother] desire joint custody of their two minor children [P and K] with actual physical custody being with [the mother], subject to the right of reasonable liberal visitation by [the father]'.

Provisions were made for financial support of the minor children by the father. The bonds of matrimony were dissolved. It is necessary only to record the final paragraph:

'That [the father] shall have visitation with the two minor children of the parties every other weekend and shall be entitled to 8 weeks' visitation during the summer of 1983 with the

minor child, P, and 4 weeks during the summer of 1983 with the minor child, K, until the year 1984, at which time [the mother] shall be entitled to 8 weeks' visitation with each minor child, . . .'

I do not propose to read the rest of that detailed provision, except to say there is a provision that the mother shall pay one half of the cost of transportation so as to facilitate the visitation by the father:

'In the event [the father] moves to Canada, [the mother] agrees to pay one half of the cost of the transportation for each child one time per year.'

That was the position in and around the dissolution of the marriage and it will be necessary later in this judgment to record the views of the legal effect of that agreement being read into the court record in 1982. It is important, however, at this stage to note that the agreement in the court record provided for joint custody with physical custody to the mother and visitation rights to the father.

In January 1983 the mother, with the two children, moved from the maternal grandparents' home and lived with the maternal great-grandmother who was also living in Wisconsin.

In January 1984 there was another move when the mother and the children set up their own home in Wisconsin. Until September 1984 there is no evidence that the mother did not permit, and the father did not enjoy, access to the children generally along the lines provided for in the order of the October 1982 record.

Apart from the paternal grandparents who lived in Canada, the mother's family had homes in Wisconsin and the father in the neighbouring State of Minnesota.

The mother's next move could be taken as starting the difficulties which subsequently arose in this case. The pattern of access was broken when she decided to leave Wisconsin in a vehicle described, in a manner with which I am not immediately familiar, as a U-Haul Truck. The plan appearing to be to go to Calgary, Alberta, to occupy student accommodation where the mother was going to study at the university, I take it, at Calgary. Those plans, however, did not come to fruition because K became very ill: she had a tumour. The mother certainly informed her family in Wisconsin about it and members of her family arrived. She also telephoned the father, but it is not clear whether she said precisely where K was. She also informed the paternal grandparents who came to Calgary. The father's complaints were that, generally speaking, he was kept in the dark about the move in the first instance. He denies that he ever approved of or gave consent for it. His counsel, Miss Scotland, described the conduct of the mother during the ensuing years in the general terms that she was playing 'a cat and mouse game' with the father, letting him know from time to time where they were and at other times, not. It certainly seems that in the years 1985, 1986 and possibly 1987, once a year, in some way or another, K went back to Minnesota and stayed for a matter of weeks with her father.

From the early days in September 1984 the mother renewed an acquaintanceship with one Mr P whom, apparently, she and the father knew in the early days when they first went to Canada. She went to stay, during the stressful and anxious times over K's illness, with Mr P. Then, when K reached the stage of convalescing, she also went to that house.

The father exhibited a letter dated 9 October 1984 which came into his possession, written by the mother to members of her family in Wisconsin. It is a long letter, and I do not propose to read it in full. It refers to Mr P as 'M', in very warm and glowing terms. It describes the pleasure of her association with him. That is not of any significance to the

matters with which this court is concerned. But what is of significance is the postscript, which reads as follows:

'D [the father] doesn't have a clue where I am. I do not intend to tell my lawyer, but M [Mr P] has suggested that I simply forget the communication, dispense with attempting to collect the $400 [the child's maintenance] he's supposed to be contributing now, and if he tracks us down, we congratulate him. Otherwise, we just say "Screw the bum". I think I like M's attitude.'

I read that merely to give a flavour of the attitude of the mother towards her obligations to afford access to the father, and the obligations under the joint custody order to which she had agreed and which was recorded in 1982.

On 26 November 1984 the mother married Mr P, and E was born on 15 August 1985. As I have said, in 1985 and 1986 K stayed with her father on access visits during the summer holidays. In December 1986 the mother and Mr P separated and the mother moved out of Mr P's home to another address. In December 1987 she had moved to Canmore, which is very close to the larger city of Banff where she had obtained employment, and K was moved to a school in Banff. Although there have been no details of schooling (it was a matter which was canvassed in argument), it is quite clear that prior to this move of school to Banff there must have been numerous other moves of school because of the age which K had attained in December 1987.

For a short period, and for my part I pay little significance to it although it was relied on by Miss Scotland as showing the propensity and character of the mother, in May and June 1988 the mother left the children with a nanny while she went on some agricultural expedition in the forest. But, on her own affidavit filed in the American courts at a later stage, she says she kept in constant touch with the nanny and went back from time to time to make sure that all was well. So I would not attach so much significance to that interlude as Miss Scotland would have invited us to do. However, in that month also, the mother met a Mr B, a man 27 years her senior, we are told, who later became her third husband and, in the following month, on 27 June, it is common ground that the mother communicated with the father, with the idea of K living with him for a whole school year. Again, there are disputes as to the reasons for that. The mother says that she was anxious for K to cement or develop her relationship with her father. She, herself, had been denied a relationship with her father and she felt strongly about it. There are other versions, that she said she wished to take employment in England for a year, and so on. In my judgment it matters not for the purposes of this appeal what the true motive for that arrangement was. It was the common intent between the parties that the transfer should take place for the period of that school year, and on 8 September 1988 the mother swore a formal document at Canmore, Alberta before a notary public, reading:

'I give permission for my daughter, K, to live with her father in Minnesota for the 1988-89 school year.

I waive child support payments for the months she is there. We agree that K will return to my care in June 1989.'

On 14 September 1988 the father's attorneys sent a draft stipulation for signature by the mother, to be presented to the Minnesota court, formally recognising a change of custody to the sole custody of the father. Again, the father's motives behind this are not entirely clear. There is dispute between the parties. I do not propose to burden this judgment with an analysis of this dispute. The mother in any event would have no part of it.

On 4 October the father gave a formal notice of a motion that he was going to make to the Minnesota court, seeking a change of custody. He swore an affidavit in support of that application. I need only to refer to the affidavit for one or two matters. The father deposes:

'That from 1 September 1984 until the end of October 1984, [the mother] withheld from me the location of our children, until [the father] was informed by telephone that she had moved the children out of the United States to Canada. She only informed me that they were residing in Northwest Calgary, and would not inform me if my daughter K was attending school. [The mother] made the residence change out of the United States without notice to, and permission by, me, and without any permission by the court. She had further failed to provide her address changes to the court.' It has been suggested that those were requirements of the court in cases of this kind, that changes of residence of a major nature had to be communicated to the court. That matter was not determined, and it is not necessary to do so for the purposes of this judgment. However, reference was clearly being made to the Minnesota Family Codes, para 518.175, subdiv 3, which provides as follows:

'The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree. If the purpose of the move is to interfere with visitation rights given to the non-custodial parent by the decree, the court shall not permit the child's residence to be moved to another state.'

I now go back in time to 3 July 1988 when, in accordance with the agreement (which I have already recited) between the mother and the father, the father went to Canada and collected the two children. It is common ground that, thereafter, K lived with the father and his second wife and family in Minnesota, until the events which took place on 5 October 1988 with which this court is particularly concerned. The mother came to Minnesota from Canada. She intercepted K on the school buss without the knowledge of the father. There was thereafter, however, contact. But the mother returned to Canada, in all probability with K. I put it in that way because Miss Scotland did not accept that there was evidence establishing that K went with her mother to Canada. For my part, although I do not attach a great significance to that point, it would appear almost certainly that she did go to Canada for a few days.

The account of 5 October given by the father is to be found in the affidavit, which he swore the following day on 6 October and reads as follows:

'. . . [the mother], without any notice to myself, or any member of my family, reappeared in Minnesota on 5 October 1988, with the intent of taking K with her.

That on 5 October 1988 [the mother] appeared at the bus stop, and took K without my knowledge.

That [the mother] took this unreasonable action, despite the fact that she had told me that she would be in England, at least through July 1989.

That as a result of this action, I contacted the police, and filed a Missing Person Report.

That [the mother] contacted me later that same day, and demanded a meeting with myself and my attorney regarding the child custody/visitation issues presented by my attorney'. [That would appear to have been referring to the draft stipulation which I have already mentioned.]

'That [the mother] demanded that we reach an agreement regarding custody, or that she would leave the State with my daughter and that she would not allow any future visitation in that event.

That my attorney and I met with [the mother] and her counsel, and ironed out a temporary custody agreement whereby the child would remain in Minnesota for the remainder of 1988.

That despite this tentative agreement, [the mother] chose not to honour our request, and took immediate steps in preparation for returning to Canada.

That papers were filed to challenge custody, but were later withdrawn to avoid emotional damage to my daughter.'

That is the notice of motion to which I have recently been referring in this judgment, and which the father withdrew on 17 October 1988.

The mother's account in her affidavit, sworn on 21 October 1988 in proceedings in the Minnesota court in support of a motion she brought for her attorney's costs after the father had withdrawn his motion, said this, referring to the notarised statement which she had sworn in Calgary:

'Upon receipt of this notarised statement, I received another call from [the father], telling me that that wasn't acceptable to the court. [The father] said he needed something to indicate that it was permanent, as the court demanded a formal document indicating a permanent custody change, that we would change it again in the spring to make sure that [the mother] came back to me. I became very suspicious and said I wasn't interested in signing anything like that. Shortly before the end of September, I received in the mail from [the father's] attorney a Stipulation that clearly changed custody on a permanent basis to [the mother]. That was not our agreement and that was not what I was willing to do, and I told [the father] and his attorney so. At that point I drove to Minnesota to straighten it out.

My US attorney set up a meeting in her office with [the father], his attorney, my attorney and myself to discuss the matter. Before the meeting, I visited K and spent several hours with her. I was very distressed at the change in K's mental outlook and statements. She had become a very guilt-ridden child. K's emotional health is crucial to her well-being, given her delicate health and a 60% chance of recurrence of her tumour. I decided that it was not in K's best interests to stay with her father. When I informed [the father], his attorney served me with court papers, which had obviously been prepared beforehand. He clearly had no intention of discussing the matter.

I was very upset with the mind games [the father] had obviously been playing on K. He told K she was with him because I was going to England and didn't want to take her with me, which is patently false.'

That passage from that affidavit is significant in the absence of any mention of any plan to go to England, either on holiday or otherwise, formed by the mother. But, nevertheless, on 17 October, some 4 days previously, she had, as a result of an application made either on that day or more probably earlier, been issued with a passport from the Passport Office in Calgary in K's name, enabling her, therefore, to travel to England. The significance, as we were told at the Bar, is that for the purposes of travelling as between States within the USA, and indeed across the frontier to Canada, no passport was required for K. She had never needed one in her own name before, and it is not clear whether she was on her father's passport or whether she simply did not have a passport at all. But it is impossible not to pay some attention to the timing of that affidavit, sworn for the purposes of obtaining costs in

relation to the withdrawn notice of motion of the father; 4 days after, there was a passport in the hands of the mother enabling her to come to England. Indeed, a week later the mother left Canada, accompanied by the two children, and travelled to England. She went first to Derbyshire, where K was for a short time put into at least one school. Later, the mother renewed her acquaintanceship with Mr B, whether in Derbyshire it is not certain, but, clearly from documents to which I will later be referring, she was at least temporarily in his establishment from the turn of the year.

However, before turning to those matters, in view of submissions made by Mr Karsten, it is necessary to look at the position of the Minnesota court. The first document from that court is one recording a judgment of his Honour Judge Cass. This was the judgment on the application for costs. It is not important to record that the judge saw fit not to grant that motion, but the findings of fact made by the judge are of relevance and, in view of the articles and the section to the Act, are of at least importance to this court although, as Mr Karsten submitted, not absolutely binding. The findings of fact record, first of all, para 9 of the 1982 record, which I have already read, but in describing it Judge Cass says this:

'The judgment and decree as provided in the court's conclusions of law does not specifically grant physical custody of the children to either party, but it appears [the mother] was to have primary physical custody of the children . . . On 3 July 1988 [the father] obtained temporary physical custody of K with the consent of [the mother] who was planning to take employment in England for one year. K resided with [the father] and his wife at [ ], Minnesota between 3 July 1988 and 5 October 1988, when she [K] returned to [the mother's] custody.'

The judge then relates the schools and institutions which K had been visiting, and I pass to para 5:

'On 5 October 1988 [the mother] retook physical custody of K from [the father] without [the father's] knowledge or consent. Thereafter, [the father] served and filed his notice of motion, scheduled for hearing on 26 October 1988, requesting a change of custody of K from [the mother] to [the father].

On 17 October 1988 [the father's] attorney advised [the mother's] attorney that on behalf of [the father], he was withdrawing [the father's] notice of motion . . .

Minnesota has sufficient contacts with the parties and their child pursuant to Minn Stat 518A.03, subd 1, upon which to base [the father's] motion for a change of custody made in accordance with Minn Stat 510.18(d)(i)(ii) and (iii). Based upon the foregoing, the court makes the following:

ORDER

[The mother's] motion for attorney's fees and costs and disbursements is DENIED.'

There was a memorandum attached to the court record which contains a relevant point:

'The court has made a narrow decision. All that was decided is that [the father] produced sufficient evidence to justify an assertion of jurisdiction under Minn Stat 581A.03, subd 1, and that such an assertion was in good faith and not intended to harass [the mother].

The court did not decide whether or not it would assume jurisdiction of the case pursuant to Minn Stat 518.03, subd 1, or that if jurisdiction was assumed, [the mother] would be entitled to a hearing under Nice-Peterson v Nice-Peterson, 310 N W 2d 471 (1981).'

It is quite clear that Judge Cass was perfectly prepared to assume jurisdiction and deal with the mother's motion and that the Minnesota court considered itself to be the appropriate court to deal with the position arising in relation to custody, access rights and so forth, arising out of the order and record of 1982.

This appeal will be concerned with submissions relating to that period, and I mention them for the purpose of clarity at this stage. I must return to them later in greater detail. But it is quite clear that there, the judge was finding that immediately prior to 5 October 1988, K was habitually resident in Minnesota with her father and, moreover, that the father was exercising rights of custody during that time, that is the period of the school year 1988-89. That does not bind this court, but I have to say, in my judgment, it is of very great weight indeed.

The President in his judgment was clearly of the same mind. At p 2D of his judgment he said this:

'On 5 October 1988 the mother removed K from Minnesota from the father's care . . . taking her away from the school bus without the father's knowledge. Indeed, she retained K after that time, although she did get in touch with the father, having taken the girl into her own possession and custody and then she went to Canada. The father had meanwhile [contacted] the police and filed a missing persons report.'

As I have already mentioned, in England the mother re-established contact with Mr B. She says she went on a holiday, which changed when her relationship with Mr B developed. The father in his affidavit sworn on 15 May 1990 in this court, dealt with this period in these terms:

'After [the mother] divorced her second husband [Mr P] somewhere between 1987 and October 1988, I learned of the existence of Mr B in the spring of 1989, when I found out where [the mother] and K were. I was given an address for contact in around December of 1988, but I had no telephone number and no means of ascertaining whether or not [the mother] and [K] were in fact at that address. It was not until April of 1989 that I received a telephone number for [the mother] and my daughter and I was able to speak with my daughter for the first time. It is totally untrue that I had any knowledge of [the mother's] plan to come to the UK, even for a holiday, and I most certainly did not consent.'

The mother had said that the father knew about the move, and it is right to say that Miss Cronin drew the court's attention to a number of telephone accounts which indicated calls passing from the maternal grandmother to a number which would appear very likely to have been the home of Mr B. These started around Christmas 1988. There is no doubt that there were phone calls being made by the maternal grandmother. It is equally obvious that at the present time the maternal grandmother is fully supporting the father's case. There is no evidence to establish when that allegiance started. It is by no means certain, and certainly would not be sufficient to discredit a sworn affidavit of the father's, as Miss Cronin invited us to do, to assume that, because the maternal grandmother in Wisconsin knew of the telephone number, necessarily she would have told the father. That is by the way, but I mention it because some point was made by junior counsel who followed Mr Karsten by way of reply.

On 8 April 1989 the mother married Mr B and they set up home in Yeovil, Somerset. At that time it is common ground that the mother formed the intention permanently to remain in the UK. A letter was written on 3 May 1989 by solicitors instructed by the mother, informing them that she and K would be staying in England, saying:

'Should you need to communicate at all relating to K would you be kind enough to do so through us.'

On 8 May the attorneys instructed by the father wrote to the mother at the address which had now been disclosed. This is an important letter in view of submissions made by Mr Karsten, with which I must deal shortly, that the father had acquiesced in the move to England. The letter refers to the court's final order in the marriage dissolution, that is the 1982 record, and asks the mother: '. . . to contact [them] to make arrangements for the summer's visitation schedule with K.

Also, arrangements will need to be made for you to transport K from England to the Twin Cities and back [Minnesota].

Of course, if the said court order is not complied with, [the father] will have no alternative but to seek the court's assistance in enforcing his visitation rights, including, but not limited to, compensatory visitation pursuant to Minnesota Statutes'.

Mr Karsten relies on that letter as being a letter of acquiescence to the move. Miss Scotland submits, and for my part I prefer her submission, that that was merely a negotiating document and negotiating parties are not to be taken as acquiescing in a position against which they start their negotiations. I think there is very considerable force in that submission.

On 23 August there is further correspondence by way of a letter from the father's attorneys to the mother's solicitors in England:

'As attorney for Mr S, I am hereby making formal objection to you as solicitors for [the mother], and her demand that my client's visitation with his daughter K should be made in England. Therefore, we are requesting that your office submit to [the mother] that she provide us with a schedule whereby the child shall travel to the United States to visit with her father in accord with the order of the Minnesota divorce court.

I am also requesting that your office state whether you are willing to receive service of legal papers as counsel for [the mother]. Please advise this office immediately of your willingness to receive service in her stead.'

On 8 September those solicitors reply:

'We have passed on details of your request to our client . . . We would say in answer to your penultimate paragraph that we are not instructed to accept service of any papers on behalf of our client . . .'

On 6 October 1989 the father initiated proceedings in the Minnesota court. These came before the Honourable Thomas J Armstrong. I propose to refer to what appears to be a copy of the formal court record. Again it recites the record of 8 October 1982 and records the following facts and findings:

'The judgment and decree did not specifically grant physical custody of the children to either party, but facts would indicate that [the mother] was to have primary physical custody of the children . . .

That [the mother] removed the minor child, K . . ., to England, without the permission of either [the father] or the court.' [That again is a reference to the code which I have already

cited in this judgment, subdiv 3 of para 518.175.] 'That as a result of this removal, [the father] is being denied his rights to reasonable visitation.

That [the father] alleges that the move to England was unlawful, as [the mother] did not obtain the signature of [the father] upon, the passport of the child. That it is the further allegation of [the father] that [the mother] forged his signature upon the passport.

That [the father] has provided information to the court that there is an outstanding warrant for the arrest of [the wife] for writing bad cheques.' [And I add that that refers to matters in Canada.] 'That [the father], in his personal affidavit, has stated several instances of actions on the part of [the mother] which would demonstrate that it is not in the best interest of the minor child to remain in the physical custody of [the mother].

That testimony was taken at this hearing from [the maternal grandmother], Mrs E, which indicates that [the mother] was properly served with motion papers for a change of physical custody, and that she has refused to appear in this court to defend this action, and is in default.'

The order, as a result, affected a change to para 9 of the record of 8 December 1982, to be amended as follows:

'That the legal and physical custody of the minor child of the parties, namely K . . ., shall be in [the father], subject to reasonable supervised visitation in [the mother].'

Mr Karsten has submitted that as the mother was not served properly in accordance with English procedure, and was not heard at the hearing before Judge Armstrong, the order of that court is in some way flawed. With respect to his submissions, I am totally unpersuaded by that. Here is a formal record of the court or a copy of such, a finding that there was evidence from the maternal grandmother indicating that the mother certainly knew about the motion papers and if, according to the law of Minnesota, the Minnesota court considers that proper service was effected upon her, for my part I cannot see why that judgment of that court should in any way be flawed. Mr Karsten was courageous enough to suggest that she might have been well advised to have taken the course of not appearing before the court. That submission is a matter for him, but it certainly does not impress me. This mother was deliberately failing to face up to the problem which she herself had created by her conduct. As a result Judge Armstrong made the order of the court. It is upon that order that the President was relying, within the terms of the Treaty and the Act, for making the order which he, in fact, made.

In accordance with that, application was made on 10 April 1990 to the court in England within the terms of the 1985 Act and the Convention. An order was made by Swinton Thomas J, the significant provision of which was that:

'the court welfare officer do prepare and lodge a report (orally if necessary) and ascertain the wishes of the minor, . . .'

The hearing was adjourned on certain provisions which enabled K to stay with her mother in the meanwhile.

It is now necessary for me to return to those articles of the Convention which I did not read into the judgment at the beginning.

Article 12 reads as follows:

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

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

I pause to indicate that one of the central issues is whether or not K 'is now settled in her new environment' so as to come within that provision.

Article 13, so far as is relevant, provides:

'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; . . .'

I have already mentioned Mr Karsten's submissions based on the father's alleged acquiescence, and I will return to consider them in more detail in a moment.

'(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'.

This was also relied upon by Mr Karsten, with particular emphasis upon placing the child in an intolerable situation, but not abandoning the earlier criteria:

'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.'

I make two comments about this article. First of all, the President found that the child had attained the age and degree of maturity and there has been no dispute about that. Secondly, that the important words in that paragraph of the article are 'may also refuse'. There is, therefore, a discretionary element in that paragraph.

Article 14 is relevant, and I have already touched upon the effect of it in the earlier part of this judgment:

'In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested state may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures of the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.'

Article 16 reads thus:

'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . .'

Article 18 is the last article I wish to read:

'The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.'

Turning now to the judgment of Sir Stephen Brown P, I go first to p 4H, where he said this:

'I am quite satisfied on the evidence before me that the father at no time agreed to, or acquiesced in, the mother's action in taking K away from Minnesota on 5 October 1988. That matter, as I have said, is further confirmed by the finding of the court in Washington County [that is the Minnesota court] of 12 December 1989'.

For my part I can see no possible way of objecting to that finding, once one sees the features of this case and particularly the finding of the Honourable Judge Armstrong, as recorded in the Minnesota court record.

The second finding of significance of the President is at p 6D:

'In my judgment [K] was "habitually resident" in Minnesota at the relevant date in October 1988. It is clear that at that time the father was exercising his rights of joint custody within the meaning of sub-para (b) of art 3.' By pure coincidence, Mr Karsten was concerned with another appeal before the Master of the Rolls, and was able to tell us of the apparent view being taken in that court about habitual residence. I do not need the authority of that to come to the same conclusion that one must look at the factual position existing at the moment of the removal. If, immediately prior to that, first of all, the habitual residence of the minor (to the extend that it was not a passing visit) was with the person having actual physical control at the time, then that must be sufficient. In the circumstances of this case, K was with her father under a plan which provided that she would have been residing with him for the whole of the school year 1988-89. This must be, in my judgment, more than a sufficiently substantial period of time to effect the transfer of habitual residence with effect from the transfer of actual physical custody to the father, so that at the material time for the purposes of these considerations she was habitually resident with him. That is precisely the conclusion reached, which I adopt with respect, by the judges in the court in Minnesota.

Mr Karsten mounted an ingenious submission that the negotiations between the father's attorneys and the mother's attorneys, after the mother had removed K from the bus stop, indicated that the effective removal, if there was one, was one from the home in Calgary. I cannot accept that submission. One must look at these matters in a realistic way. The agreement was that K should be living with her father for this protracted period of time, and the fact that on the way to England there happens to be a short stay in some place undefined in Canada, assume it to be Calgary, cannot affect the nature and quality of the removal on 5 October 1988 as being wrongful within the terms of this Treaty. The President so found, and I for my part see no ground at all for disturbing or criticising that finding.

I now pass to the second group of articles, namely art 12. At p 8 of the transcript of the judgment, the President dealt with a submission that Miss Scotland made, itself - I say this without disrespect - an ingenious one, but one which does not really arise in this appeal. Her submission was that if her primary contention, that the removal on 5 October 1988 was

wrongful and the arrival in England was the subject of acquiescence, then there was a wrongful detention to which the father did not acquiesce from the date of Judge Armstrong's judgment and the order in the court of Minnesota. That was that there was a new starting point in December 1989 and that the retention thereafter was wrongful. That would, of course, eliminate the art 12 provisions. Attractive as that argument sounds in logic, in the context of this case I agree with Sir Stephen Brown P, that the real question here was whether the original removal was wrongful, and that once there is an original wrongful removal the retention thereafter does not give any new wrongful retention for the purposes of art 13 so as to exclude art 12. I think that must follow because otherwise art 12 would be otiose in its second paragraph. I now come to the question of whether or not within the paragraph of art 12 it was demonstrated that the child had settled in her new environment. Sir Stephen Brown P records that Miss Cronin relied, in addition to the mother's affidavit, on supporting affidavits from friends and neighbours and also upon a welfare report produced by the court welfare officer. The President refers to the welfare report. I find it convenient to interpose and refer to that welfare report myself. It will be remembered that it was ordered by Swinton Thomas J. It is signed by Mr Barclay, the court welfare officer. He was brought on the scene through the court welfare department in the High Court but, as I understand it, he is based in Somerset. He recorded that he had received various papers from the court, including an affidavit by the father of 6 October 1989 in Minnesota, and a further affidavit sworn by the representative of the Central Authority that exhibited various documents. He has also spoken to the former class teacher of the child.

I can pass to the relevant parts of this report:

'5. The child

K is almost 12 1/2, and when I saw her appeared a bright, cheerful and talkative young lady. She expressed her views clearly, consistently, and without any indication that they were other than her own wishes. She confirmed much of what I have noted in the previous section, particularly the nature of her communication with her father since she has been in the UK. She reports she has enjoyed contact with her father over the years and would have been content to stay with him for an extended period in 1988 but not for ever.

Since moving to Yeovil, K has attended the Park School, a good private school in Yeovil, but due to lack of money she has recently had to move to a comprehensive school situated in a village just outside Yeovil. She has only been there for a week or so at the time of writing so I have contacted her previous school instead . . .'

That was obviously very sensible, and the welfare report continues in these terms:

'K wishes to remain with her mother in their present home. She enjoys a good relationship with her half-sister [E] and Mr B whom she calls B. She would like to visit her father in the USA; a period of 3 weeks or so was mentioned as an indication of duration, and K would be happy to make the journey on her own. She has no concerns about relationships with either of her step-parents. K tells me that she is generally healthy, although she has previously suffered a lot of colds and had a tumour removed from her back about 5 1/2 years ago. She appeared healthy, . . .'

Conclusion

I am asked to ascertain the child's view. This is clear and outlined above. As usual I also wish to reassure myself that the child is in suitable accommodation and is being cared for properly. I can report that I have not seen nor heard anything to indicate that K is unhappy or not being looked after properly in her present situation.'

Returning to the judgment of the President, he deals with the mother's case in these terms:

'The argument of [the mother] is that this evidence demonstrates, in the terms of the Convention, that K has now settled in her new environment and, accordingly, counsel urges the court to exercise its discretion to refuse to order the return of the child.

Counsel relies upon the provisions of art 13 . . .'

The President recites the provisions of that article, and continues:

'Accordingly, the Article gives a discretion to the court not to order the return of the child if the matters under either subpara (a) or subpara (b) are established, or if it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of [her] views.

In this case, I do not believe that Miss Cronin relies on sub-para (a). In any event, I am quite satisfied that at the time of the removal of K in October 1988, [the father], . . . was actually exercising his custody rights and I am quite satisfied that he had not and has not consented to her removal. Neither has he subsequently acquiesced in the removal of K. That fact is, of course, specifically endorsed by the finding of the court in Washington County in December of last year.

Also in subpara (b) Miss Cronin does not contend that the return of the child would involve a grave risk that she would be exposed to physical or psychological harm, but she does contend that the child would placed in an intolerable situation. It is to be observed that subpara (b) begins with the words, "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". I do not believe that that has been established in this case, particularly having regard to the terms of the welfare officer's report which makes it clear that K is quite willing to go, even by herself, to America to visit her father. There is no basis in my judgment for a finding that there is a grave risk of harm, either physical or psychological, or of placing the child in an intolerable situation if her return to Minnesota were to be ordered . . .

This girl is now 12 1/2. She will be 13 in November . . .'

And the judge found that she is of an appropriate age. Having referred to the part of the welfare report which I have recited, the President goes on to say:

'Miss Cronin urges me to read into that indication of her views, that K "objects" to be returned to the United States and to Minnesota. She urges me not only to take into account the views of the welfare officer but also the views expressed in the affidavit which has been sworn by Mrs M, the defendant's friend, and of the mother herself.'

The President refers to these views and continues:

'I have to bear in mind that this procedure is intended to promote international co-operation amongst the States which have ratified the Convention, in order to secure the prompt return of children who have been wrongly taken from the jurisdiction of the contracting States. In this case I have no doubt that the evidence before me, whilst making due allowance for the fact that I have not heard oral evidence, plainly demonstrates that this mother has quite deliberately willfully disobeyed the orders of the court of Minnesota and sought ultimately as it were, to "go to ground" in England. She took her daughter out of the reach of her father and the jurisdiction of Minnesota quite wrongly. There is at present in force an order

the Family Court in Minnesota made as recently as 12 December. The proceedings had been properly served upon the mother but she elected to take no part. It is, of course, open to her at any time to make an application to that court for a variation of the order, but in my judgment it is the appropriate court which should consider the future welfare of K.

I do not consider that I should refuse to order the return of K upon the grounds which have been urged upon me. I believe that it is in the interests of the administration of justice as a whole, and in the interests of K herself, that her future should be dealt with by the court which is properly seized of her case so all matters affecting her welfare and her relationship with her family may be properly settled.'

Then, in accordance with the article to which I have referred, the President emphasises that in these proceedings at this stage it is not part of the court's function to go into the detailed merits.

Mr Karsten submitted that the President erred in six different respects. I think, conveniently, I can categorise them in two parts. The first is that the Treaty basically did not apply and that this was not a case really falling within arts 3, 4 and 5. Along with that, he submitted that the connection between the court in Minnesota and K was of extremely short duration and tenuous, in that K has spent an extremely short time within the jurisdiction of that court, and that really the court should not be exercising jurisdiction. He submitted that the proper court would probably be the court in Alberta Province, as that is the appropriate province for Calgary. But then there are difficulties because of the peripatetic existence of the mother over the period of years since the original order of the Minnesota court made on the dissolution of the marriage in 1982.

The view of the Minnesota court, as I have already said in this judgment, is quite clear. They considered that they had appropriate jurisdiction. It was a court where one of the parents lived throughout the whole time of the relevant period. In my judgment, it would not be appropriate for this court to challenge the exercise of jurisdiction of a foreign court within the terms of the statute if, on the face of the documents, the matter had been properly considered by that court which had reached its conclusion within the legal and jurisprudential framework existing. I do not think that that submission carries any weight or should affect this appeal. Turning to the other aspects of art 3, I will mention the further submissions made by Mr Karsten. He submitted that the President was wrong in finding that there was a wrongful removal from the Minnesota court on 5 October 1988, that the basic home, as it were, rather in the form of domicile, was in fact in Canada. For my part I do not consider that analogies with establishing domicile of origin or choice or the other exercises which are necessary in private international law are appropriate in the interpretation of this statute. The words are perfectly plain, and it is the habitual residence immediately before the wrongful removal which is the determining factor. There really is not room, in my judgment, to hold otherwise than that, in the circumstances of this case, the wrongful removal was effected in Minnesota at a time when the father was exercising his rights of joint custody and where K was habitually resident.

If that is so, it is unnecessary to deal with the other submissions which Mr Karsten made, namely that really the wrongful removal, if any, was from Calgary. I am not impressed with that submission at all. The attitude taken by the local courts is quite clear. There is certainly a considerable doubt as to whether the mother was doing more than passing through Calgary on her way to the UK. It is not necessary for me to make a determination of what her real motives were. If it was sought to establish that there was a revival of habitual residence in Calgary, as it were for a matter of a few days, that would be a matter for the person making that submission to establish it, and I see no evidence or reason for departing

from the commonsense approach of the Minnesota courts as endorsed by the President about that aspect of the case.

For my part I have no doubt that the removal of K on 5 October 1988 fell fairly and squarely within art 3. It is necessary, therefore, to turn to the second group of submissions which, I say at once, have given me greater cause for concern in this appeal. I am not worried about the decision and (as appears from what I have already said in this judgment) about the submission Mr Karsten made that the father had acquiesced in the removal within the terms of art 13, subpara (a). So far as subpara (b) of art 13, it is clearly a matter for consideration and concern as to whether or not K might find herself in an intolerable situation if she were ordered back to Minnesota. In this respect, however, I, first of all, have no reason for dissenting from the approach by the President. I would, however, go further. We have had the advantage of receiving, through Miss Scotland, an undertaking given by the father that, were K to be ordered to Minnesota, he would immediately return the matter to the Family court in Washington District, Minnesota, so that they could fully review the question of K's future, deal with rights of visitation and consider whether or not the variation of the original agreement for joint custody effected in December 1989 should again be adjusted. Most importantly, the judge also in the court in Minnesota will have the opportunity of considering and interviewing, through their appropriate welfare officers, K herself. So, as regards art 13(b), I see no reason to differ from the approach made by the President.

I would wish to add one further matter about the question of habitual residence and the removal to Canada and, indeed, the question of settlement in this country when coming to art 12. That is the submission that Mr Karsten made, that by her removal either to Canada or to England the mother had effected a change in the habitual residence of K. I do not need to refer at any length to the judgment of Lord Denning MR, to which Miss Scotland drew our attention in Re PG (An Infant) [1965] 1 Ch 568 at p 585 where he said:

'But then we are faced with the question, what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of 16? So long as the father and the mother are living together in the matrimonial home, the child's ordinary residence is the home and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart and, by arrangement, the child resides in the house of one of them -- then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home, even if one of his parents is the kidnapper. Quite generally, I do not think the child's ordinary residence can be changed by one parent without the consent of the other.'

In this case, notwithstanding that K has now been in this country and certainly at one address, perhaps, for quite a number of weeks or months, that does not have any retrospective effect for the purposes of the Convention and the Act upon the original wrongful removal upon which the application to the central authority is based, and upon which this court must decide.

The final matter under art 13 is the question of K's objection to being returned. I have read carefully the judgment of the President who clearly considered the welfare report and the other evidence on affidavit from welfare workers, a local cleric and a neighbour. Having assessed all the evidence, he came to the conclusion, bearing in mind K's willingness to go alone to Minnesota, that that threw a degree of light upon her attitude. For my part I would take the same course. What she is really concerned with is that she should not be ordered

permanently to live with her father. Against the context of that expression one must remember that, except for the comparatively short period in 1988, she has made her home with her mother and, notwithstanding the fact that over a number of years her position has been anything but stable, nevertheless, the one constant feature is the relationship between the mother and K. It is that aspect of this case which I find a difficult one to consider.

The merits of that relationship, as to whether or not the proper order in K's interests rests with the mother continuing to enjoy physical custody, provided substantial visitation is exercised by the father, and the mechanics of that, are details with which a family court must deal after a far greater inquiry than is possible or acceptable in an application under the Treaty and the Act. That is precisely what the President said in his judgment and, with respect, I entirely agree. Is there any possible reason for this court to arrogate to itself the power of commenting upon or criticising the jurisprudential efficiency of the Minnesota court? It would fly in the face of comity which lies at the base of this very Convention. It is that to which the President was referring and, in the context of K's objection or otherwise to removal and assuming that my assessment is right, that the real objection is that she should not be made the subject of a permanent sole custody order in favour of the father, then, if in her own welfare and interest that is the right order, it would be wrong as a matter of discretion for this court to pre-empt proper examination of the question by the Minnesota court, and to exercise its discretion against her return. If, on the other hand, it is in K's best interests, and it may very well be so, that she remains in the physical custody of the mother, subject to the full control of the Minnesota courts and appropriate access to her father, then there is no ground upon which K could object, because that is her own expressed view to the court welfare officer. On that approach, adopting as I do with respect what the President has said, I agree with his approach that, notwithstanding the terms of the welfare report, it would be impossible for this court to interfere with the exercise of discretion, either under art 13, indicated by the word 'may', to which I have already drawn attention, or the overall discretion afforded by art 18 to interfere with the exercise of those discretions in this court. But I would go further. I would exercise my discretion in precisely the same way as Sir Stephen Brown P did in his judgment.

Therefore, the matter of the wishes of K having been decided in that way, I must now refer to an application to adduce further evidence which was made by Mr Karsten during the course of his submissions. It occurred in this way. On the application to this court on 11 May for a further stay of the order of the President, a court consisting of myself, Butler-Sloss LJ and Sir Patrick O'Connor, extended the stay until the determination of this appeal. The court indicated informally that, as it was known that K was present in the building, it might be sensible and progressive for visiting access to be enjoyed by the father during last Friday. On Tuesday morning Mr Karsten made the application to adduce a letter addressed by the court welfare officer to the court welfare department of the High Court, which appeared to relate to a further interview between himself and K, either late on Friday after the visiting access or, perhaps, during the weekend or even on the Monday. The suggestion was that it would reinforce the views expressed about K's reaction to a possible return to Minnesota. The application was opposed by Miss Scotland who again indicated that, if the report was going to indicate that the access on Friday was a failure, she would be making an application to the court to receive a video camera record of the access to deny such a suggestion. Having heard the application and the opposition thereto, this court came to the conclusion that it would be wrong to admit any further evidence from the court welfare officer. The circumstances in which the mother had taken it upon herself to communicate with that officer locally in Somerset, and the officer's further interview with K, either in the presence of the mother or perhaps not but, nevertheless, in the ambience of her home, would be of limited assistance in putting before the court any information further to that in the welfare report already indicating the view of the welfare officer as to K's wishes. Again, it would

have been impossible to allow that application without the court attempting an essay on viewing the video-recording. The application was rejected and it was said that the reasons would be given in the judgments. I have now given those reasons. I do not think it would be proper to exercise the discretion of this court to admit evidence of that kind, particularly as it came into existence in the fraught and tense atmosphere of this appeal, and the assistance it would give in the decisions which this court is called upon to make would be of no value. Accordingly, that application was refused.

I now turn to the last matter, which is art 12, as to whether in these circumstances it has been demonstrated that K is now settled in her new environment. Mr Karsten submitted that the President made no finding on this matter. I have read the relevant passages from his judgment. It is perfectly clear that he considered art 12 at some length, and that he considered the submissions of counsel and, as I have said, before he started the hearing had been fully acquainted with the documents and the history. The countervailing submissions as to whether K could really be said to be settled in this environment, looking at the historical record of the mother and the numerous movements and schools and so on, must be a matter of considerable debate. For my part, I would not disturb the approach that the President has made on this aspect of the case. He made a specific finding on that matter. The purpose of art 12 is to give relief where the period which has passed between the wrongful removal and the application is more than a year. If in those circumstances it is demonstrated that the child is settled, there is no longer an obligation to return the child forthwith but, subject to the overall discretion in art 18, the court may or may not order such a return. Bearing in mind the many moves to which our attention was drawn by Miss Scotland, for my part, I would not consider that it had been demonstrated that K was settled in the new environment. There was from April 1989, and certainly August 1989, a dispute going on with which she must have been concerned about her future and where she was to live. She had established, it is obvious, a relationship with her half-sister, who had come through many of the other vicissitudes with her. But to say that within art 12 it is demonstrated that there was a long-term settled position in the environment in England is, in my view, a difficult question upon which to be satisfied. Sir Stephen Brown P was not so satisfied. I, for my part, would not disturb his decision on that matter. In any event, in all the circumstances of this case, Sir Stephen Brown P exercised his discretion within art 18, and observed the underlying comity of this Convention in supporting, rather than interfering with, a foreign court properly seized with the management and control of the welfare of K who had been under its jurisdiction as a result of divorce proceedings which took place in that court. I have considered all the submissions which have been made both by Mr Karsten and Miss Cronin on behalf of the mother. I realise that it will be a traumatic matter for her, and it may in the immediate or short term be an anxious matter for K. Those are not the concern of this court, although it should not be thought that the court is not mindful of the human element involved. The areas in which those matters may be taken into account are strictly circumscribed in the wordings and provisions of arts 12 and 13. They have been fully examined, and have been re-examined in this court with the assistance of most able submissions from counsel on both sides and, as a result, I am quite unable to see any ground for interfering with the order made by Sir Stephen Brown P against which this appeal has been brought. The appeal must be dismissed.

LEGGATT LJ: I agree with my Lord that, for the reasons he has given and upon the father giving to the court the undertaking to which he has referred, this appeal should be dismissed.

I add a sentence or two of my own as a matter not of law but of common humanity. I trust that it will be neutrally explained to K by both her parents that, in ordering her return to Minnesota, the court is not deciding that she must live there always. She is going there so

that the court that has all along dealt with the divorce between her parents and the consequences of it should be able to determine properly what arrangements can best be made for her and her welfare now that her parents are normally living thousands of miles apart.

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