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[16/10/1997; High Court (England); First Instance]
Re S. (Child Abduction: Delay) [1998] 1 FLR 651

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

16 October 1997

Wall J

Henry Setright for the father

Michael Hosford-Tanner for the mother.

WALL J: There is before the court an application by a father under the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 ('the Convention') as incorporated into English Law by the Child Abduction and Custody Act 1985, in which the father seeks the return of his daughter, born on 22 December 1986, and so aged ten and three quarters, to the Federal Republic of Germany, pursuant to Arts 3 and 12 of the convention. The father's application is resisted by the mother, with whom the child is living in England.

The case raises two points of interest; one procedural, the other substantive. The substantive point can be formulated in the following series of propositions.

(1) The mother accepts that on 31 May 1996, she wrongfully removed the child (within Art 3 of the convention) from the country of the child's habitual residence (the Federal Republic of Germany) to England. I will call this 'the first removal'.

(2) On 26 September 1996, before any proceedings had been instituted in either country, whether under the convention or otherwise, the child returned temporarily to Germany with her mother. Three days later, the mother took the child back to England. I will call this 'the second removal'.

(3) Proceedings were commenced by the father in England under the convention by originating summons dated 30 June 1997. In that summons the father sought the child's return to Germany, relying on the second removal.

(4) The proceedings under the convention were thus commenced more than 12 months after the first removal, but less than 12 months after the second removal.

(5) In these circumstances, what is the date of the wrongful removal for the purposes of the convention?

On the facts of this case, the question is not academic. It had direct, practical implications for the child, since the mother argues that a period of more than twelve months has elapsed since the child's admittedly wrongful removal on 31 May 1996 and the institution of the proceedings under the convention in England on 30 June 1997. She says, accordingly, that it is open to her to argue under Art 12 that I should not order the return of the child to Germany because it can be demonstrated that she is now settled in her new environment.

The procedural point arises out of an application for an adjournment which was made on the father's behalf, which I refused. I will deal with this point at the end of the judgment.

The facts

The parents are both Italian nationals. They were, however, married in 1977 in England, where many of the members of the mother's extended family live. They set up home in Germany in 1981. The child has an elder brother, born in 1978, who still lives in Germany. The child was born in Germany and was undoubtedly habitually resident in Germany at the time of the first removal.

There is an issue between the parents as to when they separated, which I have not been able to resolve. The father puts it at April 1996: the mother says it was much earlier. What is not in issue is that on 15 May 1996 the child ceased to attend her German school and that on 31 May 1996 she and the mother travelled by coach from Germany to England.

The mother and the child went initially to live with the child's maternal grandparents; however, that property was overcrowded and the mother has now been allocated her own two bedroomed local authority accommodation where she lives with the child. Since June 1996 the mother has been in receipt of income support, and although there were initial difficulties in the child attending school, she is now doing so and is reported as having settled well. When the child arrived in England at the end of May 1996, she spoke no English; however, the court welfare officer, Ms Aviva Morris, who interviewed the child for the purposes of these proceedings was impressed with the excellence of her English, describing the child as speaking fluently and with ease.

There is no doubt that when she arrived in England with the child on 31 May 1996 the mother intended to set up home permanently in England with the child. However, on 26 September 1996, the mother and the child went to Germany to visit the child's brother, who, according to the mother and her sister, had telephoned the latter to say that he was unwell. The mother and the child stayed three days in Germany before returning to England on 29 September 1996.

It appears that whilst they were in Germany in September the father saw the child. It is not clear whether this was an arranged meeting. The father says in his statement that he saw the child when out shopping on 28 September 1996 and asked her why she was not going to school. He says she could not give him an answer and 'subsequently went home'.

The father's case is that he did not know the mother had taken the child to England in May, although he was aware (as the conversation set out above indicates) that she was not attending her German school. It also appears that a few days prior to the mother's visit to Germany with the child in September 1996, the father had instituted proceedings in the German court. That court's first order is dated 2 October 1996 and records the father's ignorance of where the mother and the child were living. The order (which, of course was

made without the mother being present or aware of the proceedings) transferred custody of the child to the father. That order appears to have been confirmed on 28 May 1997, although the mother's case is that the papers were never served on her and she had no knowledge of the German proceedings until they were exhibited to an affidavit in these proceedings.

The originating summons under the convention was not issued until 30 June 1997. No explanation is given by the father for the delay. Thereafter, given that the child's whereabouts were by that stage known, the application under the convention proceeded at an uncharacteristically slow pace, with the final hearing not taking place until 25 September. I shall return to the procedural history of the case at the end of this judgment.

What is the date of the wrongful removal?

In order to consider this question, I must first set out the provisions of the convention which are relevant to it. They are as follows:

'Article 3

The removal or the 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 . . .**

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 12

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. Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.'

For the mother, Mr Horsford-Tanner relies on the first removal as establishing the definitive date on which the child was wrongfully removed from Germany for the purposes of the convention. Whilst accepting that it is clear from the speech of Lord Brandon of Oakbrook in Re H; Re S (Minors) (Abduction: Custody Rights) [1991] 2 AC 476, 499G, [1991] 2 FLR 262, 271H that for the purposes of the convention, both 'removal' and 'retention' are events occurring on a specific occasion, Mr Horsford-Tanner argues that once the first wrongful removal had taken place, that removal governed the child's status unless and until the wrongfulness of the removal was brought to an end either by an order of the court or by a specific event such as a permanent return to the country of habitual residence, or a return which, on the facts, effectively brought to an end the child's status as a child who had been

wrongfully removed. Mr Horsford-Tanner gave, as an example, a reconciliation between the child's parents in the country of habitual residence. The mere fact that the child had visited Germany for three days in late September did not alter the fact that the date she left Germany with her mother (and with the latter having the intention of residing permanently in England) was 31 May 1996: that was the date she was wrongfully removed and subsequent events, including a brief visit to Germany in September, were nihil ad rem.

Mr Horsford-Tanner is also able to argue with considerable force that the evidence does demonstrate that the child is indeed now settled in England, and that accordingly it would be in tune with the philosophy of the convention and in accord with the merits were I able to dismiss the originating summons on this ground.

For the father, Mr Setright argues that the date of the child's wrongful removal was, for convention purposes, not 31 May 1996 when the child was first wrongfully removed but 29 September 1996, when she was removed for the second time after the visit to her brother. He argues that each removal from the jurisdiction is a separate event sufficient to found jurisdiction under the convention. He accepts that the child was wrongfully removed from Germany in May 1996, but argues that if, as must be the case, her habitual residence remained that of Germany between May and September 1996, the second removal after the visit to her brother, which was without the father's knowledge and in breach of his rights of custody must also have been a wrongful removal under Art 3, and one on which the father is entitled to rely.

Mr Setright argues further that the only qualification on the word 'removal' under Art 3 is that it must be 'wrongful'. Accordingly, he says that it would be wrong to incorporate into the words 'wrongful removal' any concept of permanence or any specific intention on the part of the person removing the child. In the instant case, he argues, the second removal is 'wrongful' if it is in breach of the father's rights of custody (which it is); if at the time of the second removal the child was habitually resident in Germany (which she was); and if at the time of the second removal those rights would have been exercised but for the removal (which they would have been).

There does not appear to be any authority on the point, and on the facts it must be unusual for children who have been wrongfully removed under Art 3, to return to the country from which they have been removed before proceedings between their parents under the convention have been instituted. One can, however, easily imagine circumstances in which for family or humanitarian reasons children are returned temporarily to the country of their habitual residence after they have been wrongfully removed, and in Re H (Abduction: Acquiescence) [1997] 1 FLR 872, the House of Lords did not regard the father's request that the children should be returned temporarily to Israel for Passover as being fatally inconsistent with an intention to pursue his remedies under the convention.

The attractions of Mr Horsford-Tanner's argument are that on the facts of this case, it appears both to reflect what has happened and to fit more easily with the spirit of the convention. Apart from the three days in Germany in September 1996, the child had been living in England for over a year before proceedings were instituted under the convention, and the evidence is that she is settled here. The convention is meant to be a swift, summary process: even on the father's case nine months were allowed to elapse between removal and the institution of proceedings. The convention is not designed to decide issues of residence or custody: the sole question is whether or not the child should be returned to Germany for her future to be decided in that jurisdiction. If she is settled in England the convention makes it possible for her future to be decided in the English courts.

However, whether or not there has been a removal is an issue of fact, and on the facts of this case, Mr Setright argued that on 29 September 1996 there plainly was a removal back to England after the three day stay: indeed he went further and argued that the child's mere presence on German soil, however transient, was sufficient to satisfy Art 3 if it was followed by a removal. Thus on the examples put to him in argument, if the mother had been taking the child from England on a holiday to Prague, and had changed trains at Cologne, the journey through Germany to the Czech Republic would have constituted a wrongful removal from Germany, as would a change of aircraft at Frankfurt airport.

On Mr Setright's argument, all that is required for a removal to take place is the physical presence of the child in the country of habitual residence. He also argued that such an approach can be said in its turn to be within the spirit of the convention, since if an English child who had been wrongfully removed from England to Germany paid a visit to England in circumstances analogous to the child's visit to Germany, the English court would undoubtedly have jurisdiction to make an order forbidding the abducting parent from removing her from the jurisdiction, notwithstanding the transient nature of her presence in England.

These are powerful arguments. However, since removal is an issue of fact and depends critically on the particular facts of each case, Mr Setright's argument that mere physical presence, however transient, can form the basis of a wrongful removal under Art 3 must await a case in which those facts arise.

On the facts of this case I am satisfied that the child was wrongfully removed from Germany on 29 September 1996. The child was not in transit: she was present in Germany for three days; the father saw the child and asked her why she was not going to school; the mother removed her back to England. The removal was in breach of the father's rights of custody and at the material time the child was habitually resident in Germany. All the relevant features of Art 3 of the convention are thus satisfied.

To accept Mr Horsford-Tanner's argument would, I think, be tantamount to holding, contrary to Re H; Re S (Minors) (Abduction: Custody Rights) that a wrongful removal is a continuing state of affairs, and that one removal governs the child's status irrespective of what happens to her subsequently. That proposition does not fit easily with the wording of Art 4, which refers to 'any breach of custody or access rights'. The second removal to England, it seems to me, fulfils the criteria of Art 3, and the father must be entitled to rely on it. The child was wrongfully removed in May: she was wrongfully removed again in September. Each is a separate wrongful removal, and the father is entitled to rely on the second. It follows, in my judgment, that the Art 12 exception does not apply, and that I am bound to return the child unless one of the Art 13 defences is open to the mother.

Article 13: the child's objections to being returned

In his helpful skeleton argument Mr Horsford-Tanner raises two substantive defences under Art 13. The first is the child's objections to being returned; the second is a defence under Art 13(b) that there is a grave risk of physical harm to the child, and that she would be placed in an intolerable situation if a return was ordered. I will deal first of all with the argument based on the child's wishes.

The words in Art 13 on this point are as follows:

'. . . 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.'

A number of points should be made about this aspect of art 13. The leading case on it is Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. That concerned a child of nine. From the case I derive the following propositions.

(1) This part of art 13 is completely separate from para (b): there is accordingly no need to import into it any of the Art 13(b) criteria.

(2) This part of Art 13 must be interpreted by reference to its literal words without giving them any additional gloss.

(3) The questions raised are issues of fact within the province of the trial judge to decide.

(4) There is no particular age below which children in general may be considered not to have attained the requisite degree of maturity in order for account to be taken of their views.

(5) Where a child has been influenced by the abducting parent, or where the objection to a return is because of a wish to remain with the abducting parent, little or no weight is likely to be given to the child's views.

There has also been considerable attention paid in the authorities to the question of the child's capacity to understand what is being proposed under the convention -- that is to say an immediate return to the country from which she has been removed, so that the courts of that country can resolve any disputes between the parents. In Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716, 730, Balcombe LJ said:

'. . . the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases . . . where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss, LJ in Re M (A Minor) (Child Abduction) [1994] 1 FLR 390 at 395. . . '

In the latter case, Butler-Sloss LJ advances a number of propositions; firstly, that the wording of Art 13 does not inhibit the court from considering the objections of a child to returning to a parent; secondly, that the court must be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the state of habitual residence; thirdly, that the court has to assess the ability of the child to understand the situation and whether he or she had valid reason for not returning.

How do the S's objections fit into this background? Pursuant to the direction which I gave on 10 July 1997, the child was seen by the court welfare officer, Ms Morris, who provided a full report and gave oral evidence. Under the heading 'Degree of Maturity', Ms Morris wrote:

'S is ten and a half years old and when I met her, she was well able to express herself and to understand what I was saying. She told me that when she came to Britain in 1996, she spoke no English. Her mother and aunt were concerned whether she would need help during our meeting. However, her understanding of English was excellent. She spoke fluently and with ease. Occasionally she did not understand a word which I used and asked me to explain it. S answered my questions clearly and directly. She was able to say what she wanted and why. At first, she was reluctant to say negative things about her father, but as the meeting progressed, she became less inhibited about this and was able to describe more fully the difficulties she has experienced.'

Under the heading 'S's views about returning to Germany', Ms Morris wrote:

'S does not want to return to Germany, either to visit or to live. This is partly because she prefers her way of life in [England], where she has a nicer home and more pleasant surroundings, but mainly because she does not like her father and is frightened of him.'

S then went on to give a clear account of her father's behaviour, which included excessive consumption of alcohol and violence both towards herself and her mother, the details of which I need not recite. Ms Morris was of the opinion that whilst the child was clearly aware of her mother's views, the fears the child was expressing about her father were based on her own experience and observation of his behaviour.

S also described her English school very positively and enthusiastically and enunciated a fear (based on visits which her father had paid to her German school) that he might come to the school and take her away back to Germany. This fear had been sufficiently acute that on a number of days she had refused to go to school.

S had no good memories of her father and could not think of any people or things she missed from her life in Germany. This was a point on which Mr Setright relied, when arguing that the child lacked the requisite degree of maturity for the purposes of Art 13. He suggested that the child was either not mature enough to balance good and bad recollections of her past; alternatively that her negative experiences have blotted out the past. Either way, he argued, this monochrome view demonstrated a lack of maturity.

Ms Morris did not agree. In her experience, children who have witnessed domestic violence can be very frightened and have very bad memories, which makes it very difficult for a child to think of positives: equally, it is possible that there were no good experiences.

S told Ms Morris that there was nothing that she missed in Germany. Ms Morris agreed with Mr Setright that she would normally expect a child of S's age to have some good memories of her previous life, although she may have blotted them out. However, said Ms Morris, seeing things in black and white terms is normal for a child of the child's age: S was not immature for her age: Ms Morris assessed her as being average for her age.

Ms Morris thought S appeared to be well settled in England. She assessed S as having sufficient maturity to understand the issues in the proceedings and to have clear and rational reasons for objecting to a return to Germany. As a consequence of the experiences she described she was frightened of her father, and fearful that he would remove her back to Germany.

I accept Ms Morris' assessment of S. I was very impressed with Ms

Morris' evidence and am left in no doubt that S's views are her own, and have not been influenced to any material extent by her mother. I agree with Ms Morris that whatever the underlying facts (which, of course, I have not investigated) S appears to have clear and rational reasons for not wishing to return to Germany. In my judgment, therefore, she passes the S v S, Re R, and Re M tests set out earlier in this judgment.

That, however, is not the end of the matter. I have to weigh S's objections against the whole policy of the convention. Here the question of delay seems to me to be relevant. The philosophy of the convention is to ensure the swift return to their country of habitual residence of children who have been wrongfully removed from it. I cannot put that policy into effect in this case. For the reasons I have given, I am unable to find that the mother can invoke the Art 12 defence that the child is now settled in her new environment. It is also

clearly the case that where the door to discretion is not opened by any defence under Arts 12 or 13 of the convention, Art 12 gives a parent a period of up to twelve months between the wrongful removal and the institution of proceedings.

However, in a case where the gate to the exercise of discretion has been opened by my findings under Art 13 that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of her views, I see no reason why the time which has been allowed to go past should not be a factor in the exercise of the discretion whether or not to order a return.

It follows that the defence on this aspect of Art 13 succeeds, and the originating summons will be dismissed.

The defence under Art 13(b) and the father's application for an adjournment

At the outset of the hearing on 25 September, Mr Setright asked for an adjournment. There was a direction which I had made on 10 July 1997, that both parties were to attend the hearing to give oral evidence if required to do so by the trial judge. The father was not present. Mr Setright, with his customary frankness, acknowledged that the evidence obtained from the father via his German lawyers was neither as full nor as satisfactory as might be wished; furthermore, the father had, at the eleventh hour, indicated that he could not afford to attend the hearing. Had he expressed that difficulty earlier, suitable provision could have been made to meet the cost. Mr Setright submitted that without good quality written evidence, and no opportunity to adduce oral evidence from the father, or even to have the father present in order to take instructions; and with most of the underlying facts of the case in contention, the father's case was likely to be seriously weakened.

As the written evidence was presented, I took the view that the critical issues in the case were capable of resolution without oral evidence, and, if I had needed to do so, I would have decided the mother's Art 13(b) defence without hearing oral evidence. Oral evidence is, after all, very much the exception rather than the rule in cases under the convention. However, Mr Setright's application to adjourn raises an important issue about the manner in which applications under the convention are conducted in England and Wales, and the need for applicants under the convention and any lawyers in their native countries to understand that the court expects those who invoke the jurisdiction of the convention to act with expedition.

As has been said many times, proceedings under the convention are summary. There is, accordingly, a proper emphasis on speed of disposal. In this context the central authority for England and Wales and both the High Court and the Court of Appeal have an exemplary record. I propose to give some examples.

The English central authority, the child abduction unit (the unit) measures the time from the receipt of a request from a foreign central authority to its allocation by the unit to a specialist firm of solicitors in hours rather than days. The unit sets itself an 80% target of forwarding incoming cases to solicitors within 24 hours: in fact it invariably achieves 100% rate.

The average turnaround time between receipt of an incoming application under the convention and the final order is six weeks. For applications which are decided following an appeal from the High Court judge to the Court of Appeal, the average turnaround time is 15 weeks.

The solicitors asked by the unit to represent applicants in proceedings under the convention are by definition highly competent and knowledgeable about the convention and about the

procedure of the High Court. They invariably move quickly. Thus the issue of proceedings under the convention usually follows immediately on the allocation of a case to particular firm of solicitors. Where (as here) the child's whereabouts are known orders are expeditiously obtained ex parte for securing travel documents and for the attendance at court of the abducting parent: thereafter directions are given and the case usually heard within six weeks.

Legal aid is automatic for applicants under the convention: there is therefore never any delay caused by an applicant's impecuniosity. Furthermore, the solicitors allocated a case under the convention by the unit have ready access to members of the bar who specialise in this work. All in all, a substantial body of expertise is available to a parent wishing to make an application under the convention.

Given this level of expertise there is, in my judgment, no excuse for delay, or for any failure on the part of an applicant under the convention to give instructions promptly either to lawyers in the country from which the child has been removed or to the solicitors nominated by the unit.

The maximum time permitted for any adjournment of proceedings under the convention is 21 days (see r 6.10 of the Family Proceedings Rules 1991, SI 1991/1247). In the instant case, the originating summons was issued on 30 June. On the same day Hale J made an ex parte order securing the child's continuing presence at her mother's address. The matter came before me on 10 July. The mother was ordered to file further evidence by 18 July (which she did). The father was ordered to file his evidence in reply no later than 30 July. He did not do so. His affidavit was not sworn until 11 August. As Mr Setright accepts, it is not as full or satisfactory as it could have been.

On 10 July I was told that the case could not be ready until 25 September. This was more than 12 weeks from the date of the issue of the originating summons, double the average disposal time for an application under the convention. In order to accommodate the father, therefore, I was persuaded to grant a series of artificial adjournments.

No blame in this case for the delay can be laid at the door of the solicitors allocated by the unit. The failure to give them proper instructions and the failure to attend court must be laid fair and square at the door of the father and his German lawyers.

It must be made clear to parties involved in proceedings under the convention that in the English High Court cases are dealt with expeditiously. Delay will simply not be permitted. Cases under the convention are given priority and are regularly inserted into already busy Family Division lists, often to the prejudice of other cases. Accordingly, if litigant delays or fails to give his solicitor adequate instructions, he is likely to find that his application to adjourn the hearing date of the originating summons will be refused.

That is precisely what happened in the instant case. The father had known since 10 July that the hearing would be on 25 September and that he was required both to file his evidence promptly and to attend the hearing. Either he failed to give his lawyers in Germany adequate instructions, or his German lawyers failed to deal with the matter expeditiously; in addition he failed to attend the hearing when ordered to do so: there was no satisfactory explanation for any of these matters, and no reason to grant a further adjournment.

In these circumstances, had it been necessary to do so, I would have decided the mother's Art 13(b) defence on 25 September. In the event, however, it was unnecessary, as the originating summons fell to be dismissed on other grounds.

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