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[05/11/1997; Court of Appeal (England); Appellate Court]
Re H.B. (Abduction: Children's Objections) [1998] 1 FLR 422

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

5 November 1997

Butler-Sloss, Thorpe LJJ, Sir John Vinelott

J Hall for the child

N Carden for the mother

The father appeared as a litigant in person

THORPE LJ: On 17 October 1996 Hale J decided a Hague Convention application in favour of AHB (the mother) and against JFB (the father) Her order of that date was that the two children of the parents, A and C, be returned to Denmark on or before 1 November 1996 and that any further directions required with regard to the implementation of the order be referred to her. The judgment which she gave on that day was subsequently reported as Re HB (abduction: children's objections to return) [1997] 3 FCR 235. The family history and the contending considerations that led to that conclusion in a difficult and finely balanced case are all set out in the report and it is therefore unnecessary for me to attempt to summarise them or present them afresh in this judgment, particularly since none of the parties to this appeal have made any criticism of her judgment. Instead, I concentrate on recording the highly relevant subsequent developments.

On 31 October the father took the children to the airport by prior agreement with the mother and in compliance with the judge's order. A duly boarded the flight but C refused to do so. That situation was considered by the judge on 7 November. She set a fresh deadline for return, on or before 15 November. She invited Mrs Raleigh, the court welfare officer, to use her best endeavour to assist in securing compliance with the orders. She invited the mother to confirm in writing in the event that the second attempt should fail whether or not she wished further attempts to be made to enforce the order. On 11 November Mrs Raleigh saw C and concluded that it was unrealistic to attempt a further return as an unaccompanied minor. She proposed that the mother should come to England to collect C. Unfortunately the mother, who had borrowed to fund the flight on 31 October, was unable to meet the cost of the arrangement sensibly proposed by Mrs Raleigh. On 14 November the father's solicitors wrote to the mother's solicitors inquiring as to her future intentions. The inquiry went unanswered. Nor did the mother respond to Hale J's invitation to confirm in writing whether or not she wished a further attempt at enforcement. Time went by with very little communication between C and her mother. Thus, it is ironic that by his return A

created a separation between brother and sister, the avoidance of which Hale J had held to justify the order for his return. For in reality the mother's application for C's return had been much stronger than her application for A's return.

Meanwhile A's return to Denmark had not gone smoothly. Almost at once he reverted to delinquent behaviour and early in November returned to live in the Ronnehuis. There he remained until 1 May 1997 when he moved to experienced foster parents who farm approximately 12 miles from Ronne. However he spends every weekend with his mother and stepfather and the mother hopes that he will feel able to live with her unequivocally in the foreseeable future.

On 12 May the mother's solicitors wrote to say that she was now in funds and intended to collect C. On 23 May they issued an application for further directions for enforcement of the orders. The father did not reconstitute his legal team, saying that he could no longer afford to pay his legal aid contributions in accordance with the assessment. On 24 May C herself reinstructed the specialist solicitor whose previous application for her to be joined as a party had been refused on 25 September 1996. On 12 June he issued another application for C to be joined. Despite the direction that any further application with regard to implementation was to be referred to Hale J, the mother's application of 23 May and C's application of 12 June were listed before Bracewell J on 17 June. She acceded to the application of 12 June and adjourned the application of 23 May generally pending a proposed application by C to this court for leave to appeal the orders of Hale J. C was not put on terms as to the date by which the proposed application should be lodged nor was anything said about expedition. In the event the application to this court was not lodged until 6 August and the bundles in support were not lodged until 3 September. I determined the paper application for leave on 7 October directing an inter partes hearing on 16 October. At that hearing leave was granted and the appeal fixed for argument on 20 October. In granting leave the court gave directions as to the filing of evidence and requested a further report from Mrs Raleigh. In the best traditions of the Thomas More Department Mrs Raleigh not only saw C on 16 October but produced an eleven page report on the same day.

In the application of 23 May affidavits were filed by the mother, the father and C's solicitor. In this appeal two affidavits have been filed by the mother and one by C's solicitor. Although the father has not filed evidence in the appeal he has appeared throughout as a litigant in person supported by a McKenzie friend from Families Need Fathers.

Before coming to the submissions of counsel I wish to emphasise the importance of Mrs Raleigh's contributions. In January 1996 there can be no doubt that the court of primary jurisdiction was the Danish court since the children had had their settled residence within that jurisdiction for the preceding period of nearly seven years. A Danish court document demonstrates that on 18 January 1996 the mother was summoned to appear as a result of an application from the father in respect of his access to their children. On that date the mother was informed that the court intended to interview the children. That interview took place on 1 February 1996 and was conducted by a clinical psychologist, Jes Svennson. C's position at interview is recorded thus:

'[C] seems to be more undecided [than A] as at times she takes on her mother's point of view -- resumption of access more problematic. In fact, however, in the neutral atmosphere in which the conversation is conducted, she soon maintains the point of view that like her brother she would like the access to be resumed.'

The order that reflected the interview was not perfected until 7 June 1996 and I need quote only the following:

'[AB] and [JB] are jointly parents to the children [C] and [A]. In accordance with the Act governing parental custody and access para 17, the scope of the father's right to access and other contact with the children is determined as follows until further notice; Summer holidays in even years; three weeks. However seven weeks in 1996 from 21st June to 10th August in accordance with the parties' agreement.'

Comparable investigations conducted by Mrs Raleigh to assist Hale J were not then the subject of a written report. However as a result of Mrs Raleigh's assessment, Hale J was able to conclude ([1997] 3 235 at 244):

'In this case I do not think that that will be sufficient to amount to a grave risk of psychological harm or will otherwise place [C] in an intolerable situation. She would be going back to a primary carer whom she loves.' (My emphasis.)

Furthermore in her report of 16 October 1997 Mrs Raleigh, in reviewing the past, recorded:

'When I overheard [C]'s telephone conversation with her mother in November [1996] even though they spoke in Danish, I was aware of a passionate intimacy between [C] and her mother.'

Mrs Raleigh's assessment of C as she now is stands in sad and worrying contrast. This is how C appeared at the outset:

'Initially, [C] wanted to take me point by point, through an affidavit she was clutching. I asked her to set aside the court documents which she had been avidly and nervously reading before our meeting, and instead to speak to me generally about her situation and upon her point of view since we last met.'

There followed a long exchange during the course of which she had not a good word for her mother. She presented a history of her own life which could only have been derived from sources hostile to her mother and she accused her mother of all sorts of devious and cynical misconduct in relation to her father, her stepfather, herself and her brother. She said that her mother did not like her and that she wanted to punish her mother. At one point she said that she would only see her mother through a thick pane of security glass because her mother would otherwise grab her and run. From Mrs Raleigh's conclusions the following two passages are worth quotation:

'The child seems to me now to be much more burdened and sad about the legal contest, in which her parents, and now she herself, are engaged. [C]'s most passionately expressed motive, in combating her mother's application, is to ensure that her mother is punished for preventing contact between herself and her father. The child's perceptions of her parents have become extremely polarised. Her father (and her stepmother), she characterises as tolerant, trustworthy, reliable and caring. Towards her father, she feels affection, pity and strong identification. Her mother (and stepfather) she describes as authoritarian, unreliable, negligent and uncaring. [C] considers that she could only tolerate visiting Denmark for a holiday, to see friends and family, without her mother's knowledge, or with the protection of a court order to protect her residence, with her father in England. Only if her mother were to indicate defeat, and having been properly punished, could [C] contemplate re-establishing a relationship with her, in which [C] would have a greater power.'

On the basis of this evidence Miss Hall, instructed on C's behalf, submitted that whilst the order made by Hale J on 17 October is not open to criticism in this court, it is not an order that the judge would have made had she been able to foresee the developments which have in fact occurred. Those developments constitute such significant changes as to compel a finding

that C's objections are sufficient to justify refusing the mother's application under art 13. She emphasises that since the hearing before Bracewell J there has been no communication between the mother and C whatsoever. Accordingly, the foundation for the order of 17 October 1996 has been destroyed.

Mr Carden, for the mother, boldly submitted that his client was in court ready, willing and able to take C home and that the appeal should be dismissed.

At the conclusion of oral argument and with the co-operation of counsel, the court welfare officer and the father, the court directed that until a judgment was handed down C should remain in the care and control of her father and should have liberal access to her mother, absenting herself from school for that purpose.

On the principal issue argued I have no doubt that Miss Hall is entitled to succeed. However, it cannot be too strongly emphasised that this is a quite exceptional case. The mother's conduct between 11 November 1996 and 23 May 1997, objectively viewed, amounts to something close to an abandonment of the convention order. The letter of 14 November went unanswered as did the court's invitation to declare her intentions. If she had financial difficulties she could at least have explained them to the court and to the father's solicitors. Even more serious, in my judgment, is her contribution to the breakdown of the relationship between herself and C. No doubt she was hurt and angered by C's rejection. No doubt she was justifiably offended by the father's habit of tape recording her telephone calls. But she bore a heavy responsibility to do her utmost to sustain C through the conflict that had resulted from the conclusion of the convention application. I do not think it is fanciful to suggest that a stream of warm and affectionate cards and letters might have averted or at least diminished the scale of the present breakdown. Mr Carden's submission that we should sanction the implementation of the order as though we sat in October 1996 is quite simply unrealistic.

Before coming to consider the consequences of this preference there are a number of subsidiary conclusions that I want to express. First, if ever there were a field of implementation that requires continuity of judicial management it is the convention case. On 17 October 1996 Hale J quite rightly ordered that any further directions with regard to implementation should be referred to her. The mother's application in May 1997 should have been listed before her and counsel were quite unable to explain the departure from such an unequivocal direction. The hearing before Bracewell J resulted in an adjournment pending a proposed application which was not subjected to terms and was therefore left open-ended. If the delay between November 1996 and May 1997 is the mother's responsibility the delay between June and October 1997 is the court's responsibility. Any specialist in the field of convention litigation recognises the vital importance of ensuring a target of six weeks between application and determination at first instance. It is no less important that a similar momentum should be achieved by this court in the event of an appeal.

Second, this case illustrates only too vividly the enormous price that is paid when children are permitted to litigate, particularly when, as here, the parent is effectively passing the legal aid baton onto the child who thereafter takes up the running against the other parent. If the mother in the present case is to be criticised for her contribution to the present sad state of relationship with C, the father also has much to answer for. He has had sole care of C since 23 June 1996. Throughout that period she has no doubt been well-nourished and has performed well at school but her emotional development in that period has been disastrous and for that the father bears a real degree of responsibility. I am strongly of the view that C

should be demobilised from this war to become her mother's child and not her mother's adversary.

Third, it is possible to see with hindsight how damaging to the children's development has been the conduct of each parent. It is hardly surprising that A has become disturbed in adolescence and unless there is a dramatic change it would not be pessimistic to predict the same for C. According to the father the mother farmed the children out with her sister in order to enjoy a holiday with her second husband-to-be. According to the mother the father took advantage of her absence to abduct the children to this jurisdiction, a unilateral intervention corrected by the order in wardship of 31 July 1989 (the operation of the convention between the United Kingdom and Denmark did not commence until 1991). After three years of successful contact with their father in the United Kingdom the mother then frustrated contact for a period of about three years, justifying herself on the grounds that she was not receiving much if any maintenance and that she feared a wrongful retention. Following the agreement for the restoration of contact in the United Kingdom in 1996, the father's affidavit of 9 October 1996 concedes that he did not reveal to the mother that C had already expressed a desire to remain and that prior to her arrival he had no intention of returning her in accordance with the Danish order.

Where parties are separated but living within the same jurisdiction, adolescent children frequently exploit the opportunity to divide and conquer. Acrimony between the parents frequently prevents them from uniting to contain the attack. Where the separated parents live in different jurisdictions the opportunity is even greater and the prospects of successful parental response even less. But it is important not only that the parents should combine to contain the children but also that the court systems in each jurisdiction should equally act in concert. Once the primary jurisdiction is established then mirror orders in the other and the effective use of the convention gives the opportunity for collaborative judicial function. The Danish judge and the English judge should in any future proceedings, if possible, be in direct communication.

Turning now to consequences, in my judgment, Miss Hall's success does not result in an order dismissing the mother's originating summons of 18 September 1996. Miss Hall has only demonstrated that the mother is not entitled to an order under para 12 of the convention. Now that the para 13 proviso has been established the court must exercise its discretion to determine whether or not to order return. It may be said that in present circumstances that question is almost academic. But the court of trial must grapple with a number of exceptionally difficult questions which arise if a return under art 13 is not ordered. The problems that C now asserts were never mentioned on 1 February 1996 when she talked to the clinical psychologist, Jes Svennson. She was then settled in Denmark and doing well at school. English is not her first language. The longer she remains in her present limbo the more her Danish identity is put at risk. In October 1996 Mrs Raleigh described the relationship between A and C as 'significant, intimate, relaxed'. They have an obvious need of each other and that need has not been met throughout the last year of their lives. The management of contact for the future presents very great problems. Underlying the practical problems may be a dispute as to which is the primary jurisdiction. Manifestly, in my judgment, Denmark was the primary jurisdiction for both children until October 1996 and remained so for A. However, it may be said that C's presence in this jurisdiction throughout the past year shifts the balance. This is not a complete list but it is enough to show how great is the challenge for the court systems in this jurisdiction and in Denmark in endeavouring to prevent damage to these two children in adolescence which will mar their adult lives.

I have found this a difficult case and I can only hope that it will serve as an example to prevent similar mistakes in similar future circumstances.

SIR JOHN VINELOTT: I agree that the appeal should be allowed.

BUTLER-SLOSS LJ: I agree with the judgment of Thorpe LJ. I have found the case extremely difficult in the wider considerations of the long-term future of this girl, but the short-term decision to be made by this court is clear. The decision of Hale J in October 1996 is not open to criticism. We are, however, nearly twelve months further on and the child is still in this country. The reason to grant leave to appeal and to allow the appeal is based entirely on the events since the Hague Convention decision (see the Convention on the Civil Aspects of International Child Abduction, as set out in Sch 1 to the Child Abduction and Custody Act 1985) and the obligation on the court to consider whether the proviso in art 13 ought now to be considered, that is to say:

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

In the application of the convention by the English courts we are, rightly in my view, slow to take into account the wishes of a child even older ones, unless those wishes are clearly relevant to the decision whether to return. Many children, in the day-to-day care of an abducting parent, will understandably support that parent. The question now arises on this appeal whether the correct decision of Hale J to disregard the objections of C in October 1996 ought to be reconsidered in the light of subsequent events.

Those events have demonstrated an increasing degree of objection by the child to the return to the mother. At the airport she refused to board the aircraft. At the direction of the judge the court welfare officer assessed the position and concluded that C ought not to be sent back by air to Denmark. C has become a party to the proceedings and embroiled in the litigation. She is running now not only her own case, but what she perceives to be her father's case, he having left the running of the litigation to her. I found the court welfare officer's recent report disturbing in particular her assessment of what the girl requires from her mother. It is tragic for the girl and most unfortunate for both parents and the brother that she is now the party conducting the litigation against her own mother. I am also worried that her father has left her to fight the battles and does not seem to have the understanding or sensitivity to perceive the unsuitability of the present arrangements in the litigation.

Side by side with the mounting hostility of the child to her mother and involvement in the litigation, there has been a serious failure by the mother to make any real attempt to win her daughter over. By her omissions, however understandable, she has added to her daughter's belief that she does not love her daughter or really want her but that the mother is refusing to allow her daughter to live in England not for the benefit of the daughter but to defeat the father.

The mother has had difficulties with the illness of her husband, a lack of finance and having to cope with a small son and with the considerable difficulties experienced with the elder son. All those problems do not however adequately explain her failure to be in touch with the court or the other side over the problems of enforcing the order, the failure to be in touch with her daughter other than occasionally between November 1996 and May 1997, and the total failure from June to October to be in touch at all either by letter or by telephone with her daughter whom she wished to return to her. She had a difficult and delicate exercise to perform to win her daughter round and she appears to have made almost no effort to do so.

Wherever the blame may lie between the elder boy, A, and his mother, his almost immediate removal from his mother's home on his return to Denmark was inconsistent with the plans presented to the judge in October 1996. The fact of his not living at home must have had a significant impact on C.

The judge having come to an unappealable decision in October 1996, it behoves the English courts to try if possible to enforce the decision made. But the failure of the mother to take steps to enforce the order between November 1996 and mid-1997 and the administrative failure of the High Court and of this court to ensure that leave to appeal was heard as a matter of urgency has allowed this case to drag on for a year after the original order under the convention. The girl has now spent over a year with her father and stepmother and is polarised in her views in support of her father. She has spent a year in an English school and a year later still refuses to return home. The gulf between mother and daughter is amply demonstrated both by the latest court welfare officer's report and by her most helpful facilitating of contact between C, the mother and little brother, which was neutrally described by her as difficult, albeit that gulf hides many continuing emotions including no doubt considerable closeness and residual love by the daughter for her mother.

C is of an age which makes it impossible for the Court of Appeal, in her present frame of mind, to make a decision which would lead to an attempt by the mother to take her back to Denmark by car. Such an attempt would be traumatic for the mother, daughter and her small brother. I believe that this court cannot now shut its eyes to the relevance of the objections of a child with sufficient maturity at which it is appropriate for the court to take account of her views. We must, therefore, in the unusual circumstances allow the appeal by the daughter and remit the case to Hale J if available. She will have the task of balancing the objections of the child to returning to Denmark and to her mother against the arguments in favour of return to the country of her habitual residence for a decision to be made by that court. If Hale J decides in the exercise of her discretion not to return the child on the convention application, one argument which may still have to be resolved, is whether the future of C ought to be decided in the English or Danish court since the issue of forum conveniens is not necessarily concluded in the convention proceedings. I indorse Thorpe LJ's suggestion that, if it is feasible, the English and Danish judges might try to be in communication over the future of C and, if possible, A.

In the long term everyone must strive to give to this child the opportunity to enjoy both her Danish and her English heritage. Efforts must be made by the grown ups for her sake to reunite her with both her brothers at the least for periods of contact and to break down the barriers between her and her mother so as to revive the close relationship they once enjoyed.

I would, in conclusion, like to add my thanks and appreciation of the invaluable help given both to Hale J and to this court by Mrs Raleigh, the court welfare officer from the Royal Courts of Justice.

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