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[17/01/1992; High Court (England); First Instance]
S. v. S. (Child Abduction) [1992] 2 FLR 31

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION (IN CHAMBERS)

Royal Courts of Justice

17 January 1992

Ewbank J

Before:

MR. JUSTICE EWBANK

IN THE MATTER OF C. S. S. (A MINOR)

AND IN THE MATTER OF THE SUPREME COURT ACT 1981

AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

J.-J. S.

Plaintiff

and

K. S.-O.

Defendant

MR. H. SETRIGHT (instructed by Messrs. Margaret Bennett) appeared on behalf of the plaintiff.

MR. B. JUBB (instructed by Messrs. Moore & Blatch) appeared on behalf of the Defendants.

JUDGMENT

(As Approved by the Judge)

MR. JUSTICE EWBANK: C.S. is 9 years old. In November of last year she was living in France. On 24th November her mother brought her to England without discussion with the

father. The father then applied under the Hague Convention for her return to France. The mother concedes that the removal of the child from France was wrongful under Article 3 of the Hague Convention and that in the ordinary way this court would send the child back to France under Article 12. But she says that Article 13 applies in this case and that the court ought not to make an order, first of all, because there is a grave risk that C.S.'s return will expose her to physical or psychological harm and, secondly, because the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views.

This case is unusual because C.S. has in fact had long standing psychological difficulties. The father and the mother were married in 1979. The father is French and is 46 years old. He is a petroleum engineer working for Total and his job has taken him to various parts of the world and the family have followed him. The England neither the father nor the mother nor the child have lived in England. In 1984 the family was in Paris; in 1985 in Norway; in 1986 in Paris, and C.S. spent two months during that year at school in Paris; in January 1987 they moved to Norway and they remained in Norway until March 1991. C.S. went, first of all, to a French school in Norway for a couple of months but she then moved to a British school and from September of 1987 until they left she was being educated at a British school.

Her psychological problems showed themselves at a fairly early date. I have a report by Dr. Baudoin Chial who is a neuro-psychological doctor in France. She saw C.S. in the Summer of 1990, and this is what she says:

"The concern of the parents was that C.S. was stuttering. One month before the appearance of the first signs of stammering, at the age of two and a half years, C.S. and her mother were separated for the first time. C.S. stayed for two weeks with her paternal grandmother, who only speaks French. Mrs. S.-O. was the first to notice that C.S. repeated 'mummy' and 'papa' two or three times at the beginning of sentences. For the first six months, repetitions or vocabulary (entire words) were noticeable. When C.S. was three years old, her mother noticed hesitations at the beginning of syllables (palisyllaby).

"According to Mrs. S.-O., C.S. experienced her first total word blockage (tonic stammering) at the age of four and a half years. Shortly before that, her mother had had to be admitted to hospital for two weeks. C.S. was looked after by her paternal grandmother. This first blockage was accompanied by a temper tantrum. Since then, Mrs. S.-O. has noticed four other similar blockages.

"Associated behaviour patterns:

"Her stammering is associated with tension in decreasing order at the tongue, chest, lips, jaws, the larynx and the body as a whole. When she stammers, other behavioural features are noticeable: C.S. avoids visual contact, has a fixed stare, blushes or goes pale, and perspires. Among her 'disengagement techniques', C.S. herself says: "I put my hands over my face or my ears, I sit on the ground, I jump, move my hands along my sides, think up movements ... new things every time". During the assessment sessions sudden arm, leg, and feet movements were evident, as well as slight twitching of the nostrils. .....

"Conclusions and Recommendations:

"To this day C.S. manifests a severe clonic-tonic type stammer for which neuro-psychological and speech therapy rehabilitation techniques are clearly essential. This rehabilitation must be carried out straightaway because she has already formed a stock of associated behaviour patterns (disengagement techniques, avoidance techniques) which will

only increase and are just as damaging to communication skills as the disruption to oral flow.

"It would be preferable for C.S. to speak only her mother tongue and for French to be re-introduced only when she has achieved some improvement to her oral flow in English."

The Norwegian school had had her since 1987. It was in May 1987 when C.S. was at the French school and stuttering badly that the mother decided to act on the advice of the neurologist in Paris, and the advice included learning to read and write in her stronger mother tongue, English, and that bilingual children should learn to read and write in one language at a time. The headmistress said that C.S. gave them cause for concern half way through her first term, the Autumn of 1987, because of her stutter. Then she points out, as appears to be the fact, that it is curious to note that when she went on holiday in August 1991 (although the Norwegian school of course were not involved then) her severe stuttering cleared up completely when she went to England.

C.S. was seen by a Dr. Hales, who is a consultant psychologist. He first saw her in 1990. He refers to what he has described as her specific learning difficulty or dyslexia but also to the fact that she can become overloaded when required to remember sequencing and content at the same time. He pointed out that it is important that C.S. is not faced with any more language confusions than can be avoided and he recommends that she is generally taught in only one language and believes that in her case it should be English. He saw her again a few weeks ago. I will come back to that shortly.

So the position was that C.S. was living in Norway up until March 1991, being educated at a British school but also speaking French because her father is French, and she was unfortunately having this stutter. In March 1991 the father was posted back to Paris. He had a flat at 80 Palace des Vosges and also a house at Maisons-Laffitte. They lived at the flat in Paris. In August 1991, as I mentioned in passing, she went on holiday to England. The father did not come with her but the mother was there. According to the mother, there was no stuttering. In September 1991 the stuttering started again when she came back to France.

The marriage had been difficult for some years and by the Autumn of 1991 the mother and father were ready for a divorce. They went to see lawyers and their lawyers prepared a separation agreement. This is a deed which the mother entered into voluntarily with the advice of her lawyers. It provides that the mother should live at the flat in Paris with C.S. and the father should live at the house that I mentioned, and that the father should have unimpeded right of access. It also provided that the father would pay the mother 9,000 francs per month for herself and the child. There is no doubt, and it is conceded, that the habitual residence of all the family at that time was in France. For some reason, which I am not entirely clear about, because the agreement had been signed on 7th November, the father gave the mother only 6,000 francs instead of the 9,000 francs. I do not believe that he was intending not to honour the agreement but it was just the fact that the payment was in the middle of the month, as I understand it. But it upset the mother a great deal because she ran out of money later in the month.

On the Friday 22nd November she says she had no money. The father came around. There is no agreement about what actually happened on that occasion but it is apparent that the mother told the father that she had no money and that he certainly did not give her any money on that occasion. The following day, in a turmoil about money, the mother decided to sell her rings and she sold them for about 250 [pounds]. This was all her jewelry, as I understand it. It was a precipitive thing to do but she thought it was necessary. When she

woke up on Sunday morning, 24th November, she says she felt depressed and decided she had to get out of France.

The reasons she gave me in evidence were these: first, she feared violence from the father. That is an aspect of the case which was not looked into at all. Secondly, she felt intimidated financially because the father had not given her the full maintenance. Thirdly, she had no friends in France. And then, I thought as an afterthought, she said that then it was because C.S. was stuttering. So, having got the money from selling the rings, she took the bus to Le Havre and the ferry over to Southampton which is where her family live. She came to England and still lives in England with C.S.. She did not discuss the matter with the father. It was a unilateral, wrongful, unlawful act, and unlawful by French law.

The effect of moving on C.S., as far as her psychological problems are concerned, has been beneficial. I have a report from a speech therapist, Miss Chappel, who found a series of (inaudible) features of dyslexia and some hesitations of speech. She has been put in an English school. They say she has settled in very well. She is happy and there is no trace of her stutter. What she needs, says the English head teacher, is a period of stability. The headmistress of the French school from which C.S. was removed said in a report that she quickly became aware that C.S. had problems. She was often absent due to illnesses or indispositions, outbursts of tears, problems with digestion. She had difficulty adapting to France and to the French language and these difficulties revealed themselves in the form of speech difficulties and in writing difficulties. She was also badly affected by the discord between her parents. She adds, although I give no significance to this, that she was very glad to learn that C.S. had left for England with her mother and had become more settled there. She has no doubt that so far as her schooling is concerned, everything will be much better for her in her mother tongue.

With hindsight, I expect everybody realises that it was a mistake to send C.S. to a French school in Paris. It would have been much better if they had chosen to go to a school teaching English.

Dr. Hales has also seen her again. He feels that the present position confirms the findings of the previous assessment. He also says that C.S. is of a high intelligence and has a mental age of 12. She needs specialised support teaching with a stable and structured school environment working in English to give her a chance to make up some of the lost ground in her mainstream educational experience.

I said the mother was precipitive in selling her rings. I say that because the father in fact posted a cheque to her for the next month's maintenance on the Monday. The father did not know of the mother's disappearance until about the Wednesday. The mother came to England at first light on Monday morning and one of the first things she did was to go to solicitors and issue a divorce petition against the father. She obtained some ex parte orders relating to the child but they were all stayed pending the application under the Hague Convention. The father issued his originating summons under the Child Abduction and Custody Act 1985 on 20th December.

The first limb of the mother's opposition is that there is a grave risk that her return will expose the child to psychological harm, and there is authority for saying that a risk of psychological harm means more than an ordinary risk. I take it to mean there has to be a grave risk of substantial psychological harm. The case I am referring to is Re A [1988] 1 FLR 385.

The father says this is not a case where he is asking that C.S. should come to him and go to a French school and resume the unsatisfactory psychological situation she was in before. He is

suggesting, he says, that the mother should come back and this time she should go to an English school. In any event, he says, the purpose of the return is merely so that the proper court, which is the French court, should be able to decide what is the proper course. The French court will be able to decide whether she should live in France with the mother or in England with the mother, or whatever else may be appropriate.

There is a risk obviously of some psychological harm in moving C.S. in the circumstances to France but I have to say, looking at the picture generally, noting that the mother agreed that France was to be the home on 7th November and that C.S. was to live with her and made no objection to the French school and that C.S.'s stutter and psychological problems were not the main reason why she came to England, I am not persuaded that there is a grave risk of substantial psychological harm to C.S. in asking her to go to France while the French court decides what should happen.

The second limb of the mother's case is that the child herself objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views. The mother's evidence is that C.S. was horrified at the possibility of going back to France. Even talking about it frightens her and she has threatened to run away, she said. There was no independent evidence of C.S.'s views.

I was invited to see C.S. but on the whole that is usually an inappropriate step for a judge to take, and I accordingly asked the Duty Court Welfare Officer, Mrs. Varley, to see C.S.. She did that and she had, I believe, a long interview with her. She told me that it was an easy interview in the sense that C.S. had clear views which she was able to express clearly. She said that C.S. does not want to go back to France; she feels great in England. She was miserable at the French school, like a fish out of water. She said being forced to speak French made her stammer. She said also that she feels under pressure from her father to do remedial work. There was a suggestion from the mother's side that a child psychiatrist should be involved to look into this matter, but the Court Welfare Officer said there was no indication at all that C.S. was a disturbed child and I accordingly refused that application. Mrs. Varley said that C.S. made a most impassioned plea to be allowed to stay with her mother in England and, for her part, she would give weight to her views. I mentioned that Dr. Hales assessed her mental age as about 12.

Accordingly, I have to decide whether the age and maturity of C.S. makes it appropriate that I should take account of her views. To some extent, of course, I have to see what those views are and what they entail. It seems to me that the view she has put forward, looking at the whole circumstances of her life, is a mature and rational view which seems to be based on genuine and cogent reasons. I would go further and say I think it is probably in her best interests. I am not entitled under the Hague Convention to consider the best interests of the child in the ordinary way, but in deciding whether the views are mature, if they coincide with what seems to me to be the best interests of the child, I am entitled to take that into account in assessing her maturity. In my view the view she has formed is an intelligent and sensible decision. Accordingly, I am in a position where I may refuse to order the return on that ground. Since my own preliminary assessment of the case is that, at any rate, at this stage C.S. should remain in England with her mother, I refuse to make the order under the Hague Convention.

MR. JUBB: My Lord, a number of matters, I think, will flow from your Lordship's judgment.

MR. JUSTICE EWBANK: Would you like me to adjourn for a short time?

MR. JUBB: Yes, my Lord.

(The court adjourned for a short time)

MR. JUBB: So far as the proceedings in which your Lordship has just given judgment are concerned, I would ask for a formal dismissal of those proceedings and ask your Lordship not to make any order as to costs save that there be Legal Aid taxation for both parties' costs.

MR. JUSTICE EWBANK: Yes.

MR. JUBB: I now, if I may, move to another matter. May I just indicate that my learned friend appears on behalf of his client but it should not, as I understand it, be taken that he is submitting to the jurisdiction. I, on behalf of my client, have no objection to his taking that stand at this stage. Of course it is entirely a matter for your Lordship.

Those instructing me have now obtained a Legal Aid certificate to enable me to apply to make C.S. a ward of court. I will be asking your Lordship this afternoon to confirm a wardship and I will give an undertaking that we will issue an originating summons forthwith - it may not be possible to do it this afternoon but certainly by the end of Monday - for the matter to be heard in the Principal Registry. The reason that we ask your Lordship to confirm the wardship is that it is felt by those instructing me and myself that, bearing in mind the international flavour of this case and bearing in mind also that the divorce proceedings have been stayed and that the last order terminated on 8th January, it would be preferable for this matter to be dealt with in London and in the wardship jurisdiction.

MR. JUSTICE EWBANK: As opposed to France you mean?

MR. JUBB: No. As opposed to dealing with it under the Children Act.

MR. JUSTICE EWBANK: Alternatively, the Paris court can deal with it.

MR. JUBB: My Lord, there is always that but my submissions that it is would be preferable ----

MR. JUSTICE EWBANK: Are there not proceedings already in existence?

MR. JUBB: There have been proceedings in this country too in Southampton.

MR. JUSTICE EWBANK: More recent ones.

MR. JUBB: Perhaps in a sense, but in fact, as I understand it, there have been even more recent ones in this country since the last order should have been made on the 8th. There was a hearing but then plainly the matter was stayed and the court was unable to take any further proceedings. My submission would be that certainly so far as C.S. was concerned - and it may only be an interim measure - in order to give effect to C.S.'s position, bearing in mind that your Lordship has been the first judge to deal with the matter as a substantive matter, it would be right for this case to be a wardship in your Lordship's court, because I would be asking your Lordship to reserve it to yourself if available.

My Lord, the orders that I would seek in the wardship would be that the interim care and control of C.S. be committed to my client who would therefore become the plaintiff; that the child reside in South Dean Road at her mother's present address; that there be reasonable access and, further, that so far as the previous proceedings are concerned, I would ask your Lordship to direct that there be a transcript at public expense because plainly if your Lordship was not available for any reason and there was something that needed to be dealt

with, then at least we would know your Lordship's views and findings and those could be placed before the judge and, indeed, even if this matter eventually might be heard in France, your Lordship's views and judgment might be of assistance to the French court as well; I know not. But I would ask for a judgment at public expense. My client is on Legal Aid with a nil contribution.

So far as reserving it, I have already mentioned that and would ask your Lordship to reserve it to yourself. Those instructing me will take out the first appointment in the usual way. It may be that other proceedings are taken, I know not, but I ask that your Lordship confirm the wardship merely in fact to give C.S. some proceedings in this country which in fact control, if I may put it that way, her situation and give some direction to it. Otherwise, in my submission, there is really in effect a vacuum.

MR. JUSTICE EWBANK: There is nothing the Children Act which affects this type of the case?

MR. JUBB: No, my Lord.

MR. JUSTICE EWBANK: Just carry on as you would have done under general law?

MR. JUBB: Indeed, my Lord.

MR. JUSTICE EWBANK: Does a child have to have a guardian ad litem?

MR. JUBB: My Lord, the child can have a guardian ad litem and indeed the Official Solicitor could be invited to act.

MR. JUSTICE EWBANK: Only in public law cases you have to?

MR. JUBB: My Lord, under the Children Act the answer to that is yes. Of course in those circumstances the guardian is a very different form of guardian, if I may use that expression.

MR. JUSTICE EWBANK: The Official Solicitor continues as a guardian in wardship in the same terms as he has been in the past?

MR. JUBB: My Lord, that is my understanding, yes. Indeed, I think he anticipates that his role in wardship in the future will purely be in the private field. He only retains his ----

MR. JUSTICE EWBANK: All the things we have been seeing relate to public law, the Official Solicitor being able to give advice to quardians ad litem.

MR. JUBB: Indeed, my Lord.

MR. JUSTICE EWBANK: They do not affect the private law?

MR. JUBB: As I understand it, not, my Lord. Those are my submissions.

MR. JUSTICE EWBANK: Yes. Mr. Setright?

MR. SETRIGHT: My Lord, as my learned friend says, I am here instructed by the central authority in the child abduction proceedings which now end and, for reasons which are probably amply clear to your Lordship, where there is a potential conflict of jurisdictions, the father must consider his position so far as proceedings in the English jurisdiction are concerned. Therefore I do not in any sense stand in the way of what my learned friend seeks

to do but I invite your Lordship either to disregard my presence in your Lordship's court ---
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MR. JUSTICE EWBANK: I think the father will be pleased if you speak for him, will he not?

MR. SETRIGHT: I think he will but I hope your Lordship will accept that when I address your Lordship I do so without committing him to this jurisdiction and without taking part

MR. JUSTICE EWBANK: Have you any alternative if the child is in England?

MR. SETRIGHT: That is a matter that he must consider, my Lord.

MR. JUSTICE EWBANK: There is nothing to consider really. If the child is in England, the English court is bound to have jurisdiction, just as if the child is in France the French court is bound to have jurisdiction.

MR. SETRIGHT: Your Lordship's pronouncement carries weight with me.

MR. JUSTICE EWBANK: Good.

MR. SETRIGHT: But, my Lord, I am bound by my instructions and my appearing before your Lordship ----

MR. JUSTICE EWBANK: He is battering his head against a brick wall if he thinks that the English court somehow could be circumvented on a jurisdiction point; a child who is British by nationality and who is in England.

MR. SETRIGHT: My Lord, it may be that in due course and in fairly short course that is the view that he takes. Of course he must decide whether he should seek to canvass some aspects of your Lordship's judgment just given with the Court of Appeal.

MR. JUSTICE EWBANK: Of course. That is understood.

MR. SETRIGHT: That is a decision which he would hope to reach very shortly.

MR. JUSTICE EWBANK: Yes.

MR. SETRIGHT: After that his decision so far as submitting to the English jurisdiction is concerned may become a much clearer one but for the moment it is not made and he has not submitted to it. But, that having been said, there are no submissions at all that I wish to make. By the same token I neither do nor say anything which stands in the way of the solution to the immediate difficulty which my learned friend has suggested.

MR. JUSTICE EWBANK: What about access?

MR. SETRIGHT: My learned friend has suggested reasonable access.

MR. JUSTICE EWBANK: He has contact through this wardship now.

MR. SETRIGHT: That is an interesting point, my Lord, and an arguable one.

MR. JUSTICE EWBANK: It is not worth arguing about.

MR. SETRIGHT: One day no doubt it will be, but not today. Your Lordship can make Children Act orders in my suggestion (and I am now simply assisting your Lordship, I hope) as well as making the orders that could formally be made, so the nomenclature perhaps does not matter but your Lordship is likely to know better than do I.

MR. JUSTICE EWBANK: Does he want anything more clear than reasonable access?

MR. SETRIGHT: No, my Lord.

MR. JUSTICE EWBANK: When did he last see C.S.?

MR. SETRIGHT: My Lord, the last formal access period was after the 23rd December.

MR. JUSTICE EWBANK: Does he want to see her before he goes back to France?

MR. SETRIGHT: No, my Lord. He has to go back directly. He of course saw C.S. briefly outside court yesterday. If the father submits to the jurisdiction in due course, then no doubt there will have to be further consideration of this matter in wardship, unless matters can be agreed.

MR. JUSTICE EWBANK: I was very sorry that they were not agreed. I have no idea what the agreement was.

MR. SETRIGHT: Indeed, my Lord.

MR. JUSTICE EWBANK: It is probably best I do not know.

MR. SETRIGHT: It might be, my Lord. I have helped your Lordship to a very limited degree.

MR. JUSTICE EWBANK: Yes. Very well. What about service of the originating summons in the wardship?

MR. SETRIGHT: My Lord, that must be a matter for my learned friend, I think, for the moment.

MR. JUBB: Would your Lordship give me leave to serve the originating summons outside the jurisdiction?

MR. JUSTICE EWBANK: Yes.

MR. JUBB: By post at Maisons-Laffitte?

MR. JUSTICE EWBANK: Is that all right, so far as he is concerned? Does he want someone to come to the house and hand it to him or is he happy to have it done by post?

MR. SETRIGHT: Service by post, my Lord.

MR. JUSTICE EWBANK: Yes. Leave to serve out of the jurisdiction by post to Maisons-Laffitte. Wardship, undertaking to file the originating summons by 4.00 p.m. on Monday. Leave to serve out of the jurisdiction by post at that address. Interim care and control to the mother. The child not to removed from England without an order of the court. Reasonable access to the father. Reasonable access to the father - is that envisaged that it should be in France?

MR. JUBB: My Lord, initially in England.

MR. JUSTICE EWBANK: There is no reason in the long term why it should not be in France?

MR. JUBB: No. I quite agree, my Lord. I would hope that certainly by the first appointment we would know what the position is going to be vis-a-vis whether my learned friend is going to be appealing or whether in fact he will be submitting to the jurisdiction. But certainly in principle may I say now that the mother has no objection to access taking place outside England.

MR. JUSTICE EWBANK: Reasonable access in principle, no objection in principle to access outside?

MR. JUBB: No, my Lord.

MR. JUSTICE EWBANK: That of course depends upon getting the mirror order, I expect.

MR. JUBB: Yes, my Lord. The only thing is that, as I am sure your Lordship well remembers from times when wardships were rather more common, there was usually an undertaking given by parties that the child would be returned to the jurisdiction when called upon to do so. The difficulty is that the father is not in a position to give that undertaking.

MR. SETRIGHT: My Lord, it is likely realistically that before any access overseas takes place, the father will have made his decision on any appeal and the matter can be dealt with.

MR. JUSTICE EWBANK: Yes. I would envisage a mirror order if you get to that stage. Anything else?

MR. JUBB: Will your Lordship reserve it to yourself?

MR. JUSTICE EWBANK: Yes.

MR. JUBB: I am most grateful. Also the transcript.

MR. JUSTICE EWBANK: Yes, I think so. Transcript at public expense.

MR. JUBB: I am most grateful. Finally I would not ask for an order for costs save for Legal Aid taxation in relation to the wardship.

MR. JUSTICE EWBANK: Yes.

MR. JUBB: My Lord, I am most grateful.

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COURT OF APPEAL

Constitution:

Lord Justice Glidewell

Lord Justice Balcombe

Mr. Justice Boreham

Re S. (A Minor)

JUDGMENT

11 July 1992

Lord Justice Balcombe.

This appeal, from an Order of Ewbank, J. made on 17 January 1992 whereby he dismissed an application under the Hague Convention on the Civil Aspects of International Child Abduction for the return to France of a 9-year old girl, raises once again a question under Article 13 of that Convention. The judgment that follows is that of the court and we repeat the direction given during the course of the hearing that nothing should be published which may identify the child concerned.

The child, C.S., was born on 9 August 1982. Her mother is English, aged 48; her father is french aged 46. The father is a petroleum engineer whose work takes him to many parts of the world. The parents met in Indonesia, where the mother was working as a secretary with the United Nations. They married in England in 1979. When the mother became pregnant with C.S., their only child, they were living in Borneo. The mother came back to England for her confinement, and spent a few months in England after C.S.'s birth, but then returned with C.S. to the father in Borneo. In September 1984 the family moved to Paris, France; in September 1985 the family moved to Harstad, Norway. In November 1986 the family moved back to Paris and C.S. spent two months in a French school; in February 1987 C.S. attended a French school; in February 1987 they moved to Stavanger, Norway. From February to June 1987 C.S. attended a French school in Norway; from September 1987 until they left Norway in March 1991 C.S. attended the Stavanger British School. In March 1991 the family returned to Paris as their home where they lived in a flat in the Place des Vosges; there is also a house at Maisons-Laffitte, just outside Paris. Apart from he short time after her birth, and for occasional holidays since, C.S. has never lived in England.

Unfortunately C.S. has long-standing psychological problems. These have manifested themselves in speech difficulties -- stammering and stuttering -- and it was as a result of the advice of a French speech-therapist that C.S. should be educated in her stronger mother tongue (English) that C.S. was moved to the British School in Stavanger. This advice has been confirmed by the reports of the psychologists, both French and English, which were put in evidence by the mother. These reports shows that C.S. has a high IQ and the mental age of a child of 12; she also suffers from dyslexia, although the problem is not acute.

On the family's return to Paris in March 1991 C.S. was sent to the local school near the flat in the Place des Vosges, and she attended that school until the mother brought her to England on 24 November 1991. A letter from the headmistress of that school, addressed to whom it may concern, was also in evidence, from which it is clear that C.S.'s speech and other problems were very apparent to the headmistress, and that C.S. was also affected by the dissensions between her parents. The marriage had been in difficulty for some years and by the autumn of 1991 the parents were ready for a divorce. On the advice of their lawyers they entered into a voluntary deed of separation, which provided that the mother should live in the Paris flat with C.S., while the father should live in the house at Masons-Laffittes, with an unimpeded right of access to C.S.. The deed made provision for the financial maintenance by the father of the mother and C.S.. The deed was signed on 7 November 1991 and in accordance with its provisions the father moved out of the Paris flat on Saturday 9 November 1991. On the same day he gave the mother a cheque for 6,000 French Francs, maintaining that a third of the moth had already elapsed. Whether or not this was correct, the fact is that the mother had run out of money by 22 November. The father refused to give

her more, the mother sold her rings for about 250 pounds, and she then decided to leave France with C.S.. This she did on Sunday 24 November, and she came to England, to the Southampton area where her family lives, to a house forming part of the estate of her deceased mother and which belongs beneficially to her sister and herself. She immediately put C.S. into the local junior school, and that position has continued up to the present time.

On 20 December 1991 the father made an application for the return of C.S. under the Child Abduction and Custody Act 1985, by which the provisions of the Hague Convention are incorporated into our domestic law, and it was that application which came before Ewbank, J. on 15 January 1992 and which resulted in the order from which the father now appeals. Before the judge it was common ground, as it was before us, that the mother's removal of C.S. was wrongful under Article 3 of the Hague Convention, and that prima facie the Court was bound to order the immediate return of C.S. to France under Article 12. The issues before the judge were whether he had a discretion not to order C.S.'s immediate return under Article 13, and, if so, whether he should exercise the discretion in favour of allowing her to stay here. The two grounds under Article 13 upon which the mother relied were:

(i) under paragraph (b), that there was a grave risk that C.S.'s return would expose her to psychological harm. The judge rejected this ground and, although it was raised again by the mother in her respondent's notice on the appeal, as well as an alternative ground under paragraph (b) that C.S.'s return would place her in an intolerable situation, these grounds were expressly abandoned before us by the mother's counsel, Mr. Alla Levy, Q.C. Accordingly we do not consider them further.

(ii) That C.S. objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of her views. This was the ground upon which the judge relied in refusing to order C.S.'s return to France.

The mother's affidavit was largely devoted to C.S.'s psychological problems and her learning and language difficulties but it included the following passages:

"On many occasions C.S. has indicated to me that she does not wish to return to France . . . C.S. has expressed extremely strong feelings about returning to France, and she has an age and degree of maturity where it would be appropriate to take account of her views."

There as no independent evidence of C.S.'s views, but the judge was invited to see C.S.. He took the view that it would not be appropriate for him to do this, but he asked the duty Court Welfare Office, Mrs. Varley, to do so. Mrs. Varley had a long interview with C.S. and gave her report orally in evidence to the Court. In view of the importance of this report we set out below the relevant passages form the transcript of Mrs. Varley's evidence:

"I saw C.S., my Lord, in my office on her own and I would say as a preamble that she is a very fluent and sophisticated conversationalist. It was very easy to interview this child, so much so that she would see the drift of my question and pre-empt them with an answer. I would sum up what she said to me in her own words. She said would I tell the judge really, really strongly that she does not want to go back to France. She does not want to go back to France because she feels great in England, was how she put it.

Q. [Mr. Justice Ewbank] She feels great in England?

A. Yes. She had obviously had a miserable experience going to school in France, from her own account. She said she felt awkward and like a fish out of water at a French school. She tried to illustrate that by saying that 'Two won't go into seven'. That was her way of illustrating that, that she felt so out of place. She said that being forced to speak in French,

she thought, brought on her stammer which made her feel bad. She illustrated on how going from France to a holiday in England her stammer had almost miraculously gone at the airport, and she sees that as a sign of how much happier she feels speaking English. She felt under pressure, she said, from her father while she lived in France, to I suppose, do some sort of remedial work to catch up in the French school system and so that was a sad experience for her too. She made a very, very emotional plea that she feels more at ease in England and she feels it is more natural for her to speak English and to be be English . . . . .

Q. Did you have any feeling that the view she was expressing, an impassioned plea put into her mouth by her mother or was she expressing her own views?

A. I certainly did not think they were rehearsed, my Lord. She was able to separate, when I led her that way, the feelings of a parent and as a child. She could appreciate that children are influenced by their parents' views, but she seemed to feel quite strongly that she was not.

Q. Did you think that she was mature enough for her feelings to be taken into account by this Court?

A. Well, she is certainly intellectually mature enough to know what the situation is that she is in. Emotionally she is still a child of that age. She is still emotionally very fragile.

Q. But would you give weight to her views?

A. Yes, I would. I think she feels very strongly a dread of going back to France and she feels more comfortable in England."

In the light of the arguments that were presented to us by Miss Patricia Scotland, Q.C. on behalf of the father, it will be convenient to record that the mother, in her evidence, accepted that it would be appropriate for C.S. to spend prolonged periods of staying access with the father in France, and also to set out certain passages from the father's oral evidence:

Q. (In chief) You have heard the oral report of the Court Welfare Officer this morning, have you not?

A. (No audible reply).

Q. Is there anything that you want to say about that, having heard it?

A. No. I am happy to know anyway that C.S. is happy to be in England, this is for sure -- is happy to be at an English school rather than a French school. If she is doing well, I am happy for her.

Q. But is it still you wish ----

MR. JUSTICE EWBANK: I do not quite follow what you mean by that. 'If she is doing well, I am happy for her'. You do not mean you are happy for her to stay here?

A. No. Because I still think that a father/daughter relationship is more important than feeling better at school. . . .

Q. (Mr. Setright) You have already dealt with accommodation. What education would be available to C.S.? Where would she go to school?

A. The French school was chosen because it was conveniently 100 meters from the flat. It was where out daughter had been a couple of months before, four years ago.

Q. The same school that she had been in some years before?

A. That is right. But if she prefers to go to British school, if it is that important, we can always try to find a solution, Paris is a big town and there are possibilities for C.S. to go to a fully or partly English-speaking school.

Q. Have you done any research into that?

A. I have contacted a British school but it is not conveniently located fro the flat in Paris of the house in Maisons-Laffitte.

Q. About how far away is it?

A. I have made some investigation and they would be ready to accept our daughter provided they have interview with the parents before.

Q. How far away from the Place des Vosges is that?

A. I would say it is a good hour and a half's travel one way.

Q. But there are some other English schools which you have not investigated?

A. In Maisons-Laffitte there are schools where there is possibility to follow English even at a small age. There is an Anglican church. There is Brownies. There is quite a small active British community.

Q. So far as C.S.'s future is concerned, what language or languages had you and your wife felt that she should speak?

A. It is important that she has both British and French, so it is important that she keeps both languages.

Q. Despite the stuttering difficulty, does she speak French?

A. Yes . . . .

Q. In your view, and of course it is only your view, knowing C.S. and knowing your wife and knowing the living circumstances in France, do you think it would be very distressing and difficult for C.S. to come back to France now?

A. I would have said no but I was probably somewhat shaken by the lady's report this morning.

Q. If she came back, is there anything you think you could do to reassure her?

A. My daughter?

Q. Yes.

A. For sure I will tell her that she can count on me, that I love her. If she wants to do something, if she wants to live in Place des Vosges she can live in Place des Vosges. If she wants to life in Maisons-Laffitte, she can live in Maison-Laffitte. I mean, this is the only daughter we have. We live for our children and I do not want to do something which can hurt her and. . "

Subsequently the father gave evidence which seems to indicate that he had not previously appreciated that C.S.'s problems were attributable to her having to speak French and attend a French school. However, when the direct question was put to him, he answered in the following passage:

Q. But you being a concerned father, as you have made plain to this Court, so far as C.S. being at a French school in Paris is concerned, you have seen the report from that school.

A. True

Q. In that report it shows or indicates that C.S. was not very happy?

A. I am ready to try to find a better school. What I would say, I think big city centres are not the proper place to raise children."

We were also told that, in his final submissions to Ewbank, J., Mr. Setright offered the following undertakings on behalf of the father, if C.S. were returned to France:

1) The father would allow the mother to remain in the flat in the Place des Vosges separate and apart from him and to have care and control of C.S..

2) C.S. would go to an English-speaking school.

3) The financial arrangements in the deed of separation would continue.

The reasons for the judge's decision are contained in the following passage from his judgment. After recording the effect of Mrs. Varley's evidence, and mentioning Dr Hales' assessment of C.S.'s mental age as being about 12, he said:

"Accordingly, I have to decide whether the age and maturity of C.S. makes it appropriate that I should take account of her views. To some extent, of course, I have to see what those views are and what they entail. It seems to me that the view she has put forward, looking at the whole circumstances of her life, is a mature and rational view which seems to be based on genuine and cogent reasons. I would go further and say that I think it is probably in her best interests. I am not entitled under the Hague Convention to consider the best interests of the child in the ordinary way, but in deciding whether the views are mature, if they coincide with what seems to me to be the best interests of the child, I am entitled to take them into account in assessing her maturity. In my view the view she has formed is an intelligent and sensible decision. Accordingly, I am in a position where I may refuse to order the return on that ground. Since my own preliminary assessment of the case is that, at any rate, at this stage C.S. should remain in England with her mother, I refuse to make the order under the Hague Convention."

The arguments which were addressed to us fell under three distinct heads, although they were not so conveniently separated in the submissions of counsel:

1) The construction of Article 13 so far as it relates to the child's objection to being returned. For convenience, future references in this judgment to Article 13 are to be taken as referring only that part of the Article unless the context otherwise requires.

2) The establishment of the facts necessary to "open the door" under Article 13.

3) The factors relevant to the exercise of the discretion under Article 13 once the door is opened.

Before we turn to consider these arguments it will be convenient to set out the relevant provisions of Article 13 as set out in Schedule 1 to the Child Abduction and Custody act 1985:

"Article 13

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

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

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

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

1. The construction of Article 13

a. It will be seen that the part of Article 13 which relates to the child's objections to being returned is completely separate from paragraph (b), and we can see no reason to interpret this part of the Article, as we were invited to do by Miss Scotland, as importing a requirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation. Further, there is no warrant for importing such a gloss on the words of Article 13 as did Bracewell, Jr. in Re R. (A Minor: Abduction) [1992] 1 F.L.R. 105, at p. 107:

"The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Unfortunately Bracewell, J., was not referred to in the earlier decision of Sir Stephen Brown, P. in Re Moncrief (Minors) on 25 June 1990 (unreported) in which he rightly considered this part of Article 13 by reference to its literal words and without giving them any such additional gloss as did Bracewell, Jr. in Re R.

b) As was also made clear by the President in Re Moncrief (supra), the return to which the child objects is that which would otherwise be ordered under Article 12, viz. an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live; see in particular Article 19. There is nothing in the provisions of Article 13 to make it appropriate to consider whether the child objects to returning in any circumstances. Thus, to take the circumstances of the present case, it may be that C.S. would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Article 12.

2. The establishment of the facts necessary to "open the door" under Article 13.

a) The questions whether

(i) a child objects to being returned; and

(ii) has atained an age and degree of maturity at which it is appropraite to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge. Miss Scotland submitted that the child's views should not be sought, either by the court welfare officer or the judge, until the evidence of the parents has been completed. We know of no justification for this submission. She also asked us to lay down guidelines for the procedure to be adopted in ascertaining the child's views and degree of maturity. We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Convention is primarily designed to secure a speedy return of the child to the country from which it had been abducted.

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

c) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we. In this connection it is material to note that Article 12 of the U.N. Convention on the Rights of the Child (which has been ratified by both France and the United Kingdom and had come into force in both countries before Ewbank, J's judgment in the present case) provides as follows:

"Article 13

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provide the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

d) In our judgment no criticism can be made of the decision of Ewbank, J. to ascertain C.S.'s views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that C.S. objected to being returned to France and that she had attained an age and degree of maturity at which it was appropriate to take account of her views. Those are findings with which this court should not interfere.

3. The exercise of the discretion under Article 13.

a) The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Convention - see In re A

(Abduction: Custody Rights) [1992] 2 W.L.R. 536 per Lord Donaldson of Lymington, M.R. at p. 550.

b) Thus if the court should come to the conclusion that the child's views have been influenced by some other person, e.g. the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention. Thus in the case of Layfield in the Family Court of Australia on 6 December 1991, Bell, J. ordered and eleven-year old girl to be returned to the United Kingdom because he found that, although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia per se, but to remain with her mother who wrongfully removed the girl from the United Kingdom to Australia. On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return. This in Re Moncrief (supra) the court refused to order the return of three children aged 11, 9 and 8 to America. In the course of his judgment the President said:

"I am, however, concerned for the children. I find that they do object to being returned and that each of them has attained an age and a degree of maturity at which it is appropraite to take account of their views. I feel that I must take account of their views. Their views are not however determinative of the position and I have to consider how far they should affect me.

I feel that I should give effect to their objection in this case in the light of the fact that they give valid reasons, in my judgment, for objecting to going back to America into the care of their father, because of his former conduct. I consider that he has materially admitted this. I do not therefore propose to order their return. That is the sole extent of the order that I make. I do not determine custody rights or access rights or any other rights as between the parties. But in the light of the children's objections to being returned, I decline to order the return under the terms of the Convention and the provisions of the Child Abduction and Custody Act 1985."

A similar result was reached in the Canadian case of Wilson v Challis where on 19 March 1992 His Honour Judge Foran sitting in the Ontario Court (Provincial Division) East Region and following the decision in Re Moncreif (supra) refused to order the return of an eleven-year old boy to his father in England for what appeared to be good and valid reasons.

c) In the present case C.S. objected strongly to being returned to France. Her reasons, as given to Mrs. Varley, had substance and were not merely a desire to remain in England with her mother. This court cannot interfere with the judge's exercise of his discretion unless he took into account some irrelevant fact, left out of account some relevant factor, or was plainly wrong -- see G. v G. [1985] 1 W.L.R. 647. It could not seriously be suggested that Ewbank, J. took into account any irrelevant factor. However, he did not, in the course of his judgment, mention the father's undertaking that, if C.S. were returned to France she would attend an English-speaking school. Since this undertaking has been offered by Mr. Setright on behalf of the faterh in the course of his final submissions to the judge, it is impossible that the judge was unaware of it. It might have been preferable if he had made reference to it in his judgment, but we are quite unable to say that he failed to take it into account. The judge may well have found it surprising that the father was unaware of C.S.'s distress at attending a French school until he heard Mrs. Varley's evidence, and he may have considered the father's proposals to send C.S. to an English-speaking school in paris somewhat imprecise and by no means fully considered. In these circumstances we are quite unable to say that his

decision to return C.S. to France, even having regard to the father's undertakings, was plainly wrong.

Nothing which we have said in this judgment should detract from the view, which has been frequently expressed and which we repeat, that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed. This is an exceptional case and accordingly we dismiss this appeal.

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