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[28/02/1997; Family Court of Australia (Melbourne); First Instance]
State Central Authority v. Ayob (1997) FLC 92-746, 21 Fam. LR 567

FAMILY LAW ACT 1975

FAMILY COURT OF AUSTRALIA, Melbourne

BEFORE: Kay J.

HEARD: 28 February 1997

JUDGMENT: 28 February 1997

BETWEEN

STATE CENTRAL AUTHORITY

-and-

AYOB

REASONS FOR JUDGMENT

APPEARANCES:

Bennett instructed by Eales & MacKenzie for the applicant State Central Authority. Scarfo instructed by Bullards for the repondent mother.

JUDGMENT: Kay J.: The application is brought by the State Central Authority seeking an order for the return of a child pursuant to the provisions of the Family Law (Child Abduction Convention) Regulations (the Regulations) which Regulations purport to give operation and effect to Australia's obligations under the Convention on Civil Aspects of International Child Abduction (the Convention). Both Australia and the United States are countries that have ratified the Convention and it has been in operation between the United States of America and Australia since 1 July 1988.

Background

The factual background to this dispute, as best I can glean it from the limited material I have before me, is as follows:

S.A. married D.S. in Arkansas on 22 July 1989. There was one child of the marriage, N, who was born on 21 February 1990. The parties separated in Arkansas where they were living in February 1994. Following some litigation between them, orders were made in the Chancery Court of Paluski County Arkansas (Second Division) in May of 1994, when the parties executed a document headed: "Property Settlement Agreement", which provided inter alia that the wife would have custody of the child and set out certain visitation rights of the husband which were basically alternate weekends from Friday to Sunday and two evenings during the week, with some summer holiday visitation and other special events visitation. The agreement included the following:

The wife will be allowed to take the minor child to her home country, Malaysia, once a year for a period of up to three weeks, upon giving advance notice of at least one month to the husband. The husband shall be entitled to no visitation with the minor child during these periods, but may exercise reasonable telephone visitation at his expense. During his summer visitation period, the husband may take a vacation with the minor child for up to one week period during which the wife will not have visitation.

The agreement then provided for the payment of child support and dealt with the division of some chattels and some debts of the parties.

The court order granting a decree for dissolution of the marriage included the following:

It is further considered, ordered, adjudged and decreed that the property settlement agreement between the parties is hereby incorporated in this decree and is made a part hereof and is in all things approved by the court and adopted by the court as its order.

The mother was born in Malaysia in January of 1965 and found herself in the United States of America as a student, studying from 1983 to 1987 in Arkansas. She asserts that the relationship between herself and the husband was unsatisfactory because of his use of marijuana and that, following an assault, she separated from him in February of 1994. She said that once the parties were separated it was possible for them to have reasonable discussions and they reached an accord in terms of the property agreement to which I have already made reference.

She asserts that the father exercised his right to weekend visitation but not for weekday or summer holiday visitation. She asserts that she had no social support in America as her family were in Malaysia, and that she told the father she proposed to return to Malaysia. She tried to persuade him to allow her to go but she was "without success". She says he had no objection to the child being taken to any other American state. She chose unilaterally to move the child to Malaysia without the permission of the father on 10 July 1995.

She says that after she arrived in Malaysia there was a telephone discussion with the father wherein it was agreed that he would cease paying child support and would apply the costs of the child support to visiting the child in Malaysia. She says further that in July 1996 he came to Malaysia and stayed with her and the child for a short period and in September of that year his mother and aunt came and visited the child.

The father says that once he learned that the child had been surreptitiously taken away he was very upset. He received a phone call from the mother about a week later saying she was going to live permanently in Malaysia and that he asked for the child to be brought back to America, which request was refused. He then got in touch with the prosecuting attorney of the State Department in Arkansas and was informed that as Malaysia was not a party to the Convention there was nothing he could do to compel the child's return to America. He was told to stay in touch with the child and that, if ever the child went to a Hague Convention

country, he should take action. He then moved, on 7 November 1995 in the Chancery Court, Puluski County, Arkansas, for an order that the mother be found in contempt and that child support payments should cease.

On 7 November 1995, an ex parte order was made freezing any child support payments held by the court. The contempt application was subsequently adjourned to 29 May 1996. On 29 May 1996, the child support obligation was abated. The husband says the court refused to deal with applications for contempt and what the husband described as a custody application until he had physical possession of the child.

I pause to interpose that according to the code of Arkansas, it is an offence under para 5.26.501 to interfere with visitation and, if the minor is taken, enticed or kept without the State of Arkansas, it is a class D felony, (whatever that means). Presumably that offence itself is something in addition to any right of the court to deal with somebody in contempt of its orders.

The father says that he went to Malaysia and while he was there a number of steps were taken to ensure the child was not taken out of Malaysia. His wife took control of the passport, a stop order was placed on exits in Malaysia, and his contact with the child was supervised by a maid at her home. He asserts that the wife's father was "in politics in Malaysia" and that the wife had told him and he accepted that he was "an extremely powerful man". He said there was no possibility as far as he was concerned of making a successful custody application in Malaysia and, if he tried to do so, it might jeopardise any future relationship he would have with the child. He asked the wife that the child be brought back to America and this was refused.

In January 1997, the mother contacted the father, indicating that she wanted to come to Australia, and required the father to sign a visa application in respect of the child. Her evidence was that she had met an Australian in Malaysia and decided to marry him some time in 1997 and wanted to come to Australia with N to meet his family and to sound out prospects of employment for both her and her fiance'.

She faxed the father a form that was required by the Australian government and received it by return fax duly signed. The form reads as follows:

Letter of consent.

> **We, the parents of N, hereby consent to her to travel to Australia with S.A. -- mother -- to visit Melbourne Australia for a period of 2 1/2 weeks. We undertake to pay all her expenses and guarantee her departure from Australia at the end of the authorised stay period.**

The document is signed by the father and dated 21 January 1997 and signed by the mother and dated 20 January 1997. I have left off from my reading of the document the instructions as to how the form is to be filled in. The document contains the following footnote:

If one parent is not available to give consent, please state reason below. If parents are divorced, photocopy of custody papers (bring along the originals).

The father said that he agreed to the child being brought to Australia because he was hopeful that Australia was a Convention country and that, immediately upon learning that it was, he filed an application with the State Central Authority in the United States which application was made on 27 January 1997. The application led to the mother and child being apprehended at Tullamarine airport at Melbourne earlier this month.

Interim orders were made by this court to ensure that the child remained in Australia and under the watchful eye of the State Central Authority until such time as the matter could be heard.

The State Central Authority seeks an order requiring that the child be returned to the United States of America pursuant to the provisions of the Regulations. The mother resists the making of the order.

The Hague Convention

I move to the relevant legislation and the law that has developed around it. The Hague Convention has been described as one of the most significant examples of international co-operation presently functioning. It assumes that the removal of a child from its country of habitual residence in breach of the custodial rights of all persons who have such rights, either by court order or operation of law (including the right to determine where the child should live), is contrary to the welfare of the child and that it is appropriate that issues relating to the welfare of the child should be determined by the state where the child was habitually resident before it was either wrongfully removed from that state or alternatively kept away from that state by a wrongful retention.

The scheme of the Convention, which has been enacted into Australian law in the Regulations, is that when a child has been determined to be either wrongfully removed from a Convention country to another Convention country or wrongfully retained in a Convention country when it ought to have be returned to another Convention country, the judicial and administrative authorities of the Convention country in which the child is located are obliged to order the prompt return of the child back to the country from whence it has been wrongfully removed or wrongfully retained unless any of the criteria and exceptions set out in the Convention and the Regulations are met. Even then there may exist a discretion to order the return of the child.

Insofar as there is an inconsistency between the Regulations and the Convention and insofar as that inconsistency does not remove the Regulations from outside the scope of the Commonwealth's power to make such regulations, (being an exercise of its external affairs power), then according to the observations of Kirby J in De L v Director General New South Wales Department of Community Services (1996) 20 Fam LR 390 at 420; FLR 92-706 at 83,468:

[T]he duty of an Australian court would clearly be to comply with the plain language of a valid Australian law.

In this circumstance that law is the Regulations rather than the Convention.

However, the majority in De L said at Fam LR 393; FLR 83,449:

Schedule 1 to the regulations (the Schedule) sets out the English text of the Convention which is generally known as the Hague Convention. The term "Convention", as used throughout the regulations, is defined in terms of the text set out in the Schedule (reg 2(1)). The provisions of the Regulations thus have to be read with those of the Convention.

The exceptions that the Regulations set out for the return of the child can be found in a number of areas within the Regulations.

Was there a wrongful removal?

The first issue that arises in this case is whether there was a wrongful removal of the child from a Convention country to Australia. There is no issue in this case of wrongful retention. The child was never taken from America with the permission of the father.

The child's ties with Australia at the moment are extremely transitory. It is merely the presence of the child within Australia that gives this case any particular Australian flavour.

An application may be made to the court in Australia by a foreign state central authority in respect of a child that has been wrongfully removed to Australia from a Convention country. The issue of wrongful removal is to be determined in accordance with to the matters set out in the Regulations, in particular regs 3 and 4.

Regulation 3 provides that:

A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person . . . if, at the time of removal, those rights:

a. **were actually exercised, either jointly or alone; or**
b. **would have been so exercised but for the removal of the child.**

Regulation 4 defines "rights of custody" as including:

> **. . .rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.**

It is necessary to determine according to the law of Arkansas whether or not the father in these proceedings had a right of custody within the meaning of the Regulations and the Convention to determine the issue of whether the child had been wrongfully removed from Arkansas by the mother. According to the limited research that I have been able to undertake, there is no law of Arkansas that defines the rights of parents to determine movement of children or otherwise and the matter falls to the issues of common law.

In Gooch v Seamans (1982) 6 Ark App 219, a decision of the Court of Appeal of Arkansas, it was held that, as a general rule, a parent having custody of a child is ordinarily entitled to move to another state of the United States of America and take the child to the new domicile. However as "custody" has a broader meaning for the purposes of the Convention and the Regulations, it is necessary to determine whether, in the circumstances of the case, there existed a right to determine the place of residence of the child. To do that, I need to look, in my view, to the court order embodying the agreement between the parties and, in my view, the agreement is clear. The parties had agreed that the mother did not have the right to remove the child to live permanently in Malaysia and, indeed, could only visit Malaysia if she complied with the terms of the agreement, already referred to. In particular, that she would be allowed to take the child to her home country once a year for a period up to three weeks, upon giving notice of at least one month to the husband. It is clear, from that stipulation, that the father continued to exercise a right to determine the place of residence of the child, insofar as that place of residence was to be somewhere outside of the United States of America, in particular, Malaysia.

In my view, in the circumstances of this case, there was a wrongful removal of the child within the meaning of the Convention and within the meaning of the Regulations.

When had the wrongful removal occurred?

The next issue to be determined arises because of the provisions of reg 16. At this point, the Regulations and the Convention appeared to diverge. Article 12 of the Convention states:

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.

The significance of Art 12, in my view, is that time commences to run from the date of the wrongful removal; that is, the removal of the child from the contracting state in breach of the custodial rights of the other parent. This literal view accords with the Explanatory Report of the Hague Convention by E Perez-Vera, *Actes et documents de la Quatorzieme session*, vol III, 1980, p 426, where the reporter says as follows:

> **106. Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasise once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.**
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> **107. In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it -- something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of "integration of the child" as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the "least bad"' answer to the concerns which were voiced in this regard.**
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> **108. Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, ie how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-**

> **limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the terminus ad quem, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.**
>
> **To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.**
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> **109. The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that "the child is now settled in its new environment". The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, while at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return "forthwith" but merely of return.**

The issue in this case is confused by the provisions of reg 16(1) which read as follows:

> **Subject to subregulations (2) and (3); on application under regulation 14, a court must make an order for the return of a child:**
>
> **a. if the day on which that application was fled is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or**
> **b. if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.**

At first blush, the Regulation appears to have time running from the moment the child actually reaches Australia. In this particular case, this is somewhat crucial to one aspect of the case because it is common ground that the child has now been in Australia only a matter of weeks and that is clearly less than one year after the date upon which the child first entered Australia. If time runs from arrival in Australia, the State Central Authority submits it is unnecessary to consider the issue of whether the child is settled in his or her new environment.

In my view, while such an interpretation accords with a literal reading of the words of reg 16 (1), the Regulations have to be read in the context of the Convention and the intention of the nations adopting it. The intention of the Convention is clearly to require the mandatory return of the child within a year of its wrongful removal or retention and to require the mandatory return of the child after the expiration of a year, unless it can be demonstrated that the child has settled in his or her new environment. In my view, the critical date is the date of wrongful removal or wrongful retention and not the date of the appearance in Australia for the first time of the child.

Regulation 2(1C) includes in the definition of a child who is removed from a Convention country to Australia:

A child who is first removed to another country.

The fact that this child went via Malaysia to get to Australia does not make it any the less a child who has "been removed to Australia". However the temporal elements of the phrase "less than one year after the day on which the child was removed to . . . Australia" need to be read, in my view, with reference to "the removal" and the addition of the words "to Australia" merely give Australia sufficient jurisdiction to ground an application. There does not seem to me to be any capacity for an Australian court to deal with a child who has never been in Australia or who is not currently present in Australia and accordingly the Regulations introduce the reference to a removal "to Australia" to provide a necessary nexus between the wrongful removal or retention and an exercise of power by an Australian administrative or judicial authority.

In those circumstances, this is a child to who reg 16(1)(b) applies, one year having passed since the child's removal and before an application was made to the Australian authorities concerning that removal. In those circumstances, the second element of Art 12 and reg 16(1) (b) comes into play, namely, whether the court is satisfied that the child is settled in his or her new environment.

If the child has settled in her new environment is there a discretion to exercise?

I digress for a moment to say that while there is some suggestion in some English cases that a finding of "settled in a new environment" still leaves a discretion in the court to order the return of a child, I must respectfully disagree with those views. If those views are simply saying that by operation of common law or local statute law, as distinct from Hague Convention law, the court has jurisdiction to order the return of a child, then there is no dispute between myself and the other learned judges. If, however, it is suggested that within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment, then in my view there is no such room. In my view, the Convention and the Regulations have no further application in respect of such a child.

It is suggested in Re N (Minors) (Abduction) (1991) 1 FLR 413 at 417, by Bracewell J, that there is a discretion under Art 18 as to whether or not a child should be ordered to be returned even if it is demonstrated that the child has settled in a new environment. Her Lordship said:

So the position under the Convention, so far as this case is concerned, is that it is mandatory to return the children even though more than one year has expired since their abduction, unless it is demonstrated that the children are now settled in their new environment. In the

event of the court being so satisfied, then a discretion arises under art 18 as to whether or not to order the return of the children.

Similar observations were made by Purchas LJ in Re S (A Minor) (Abduction) (1991) 2 FLR 1 at 25.

Article 18 of the Convention states:

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

In my view, Art 18 does no more than indicate that the Convention makes up part of the law of a country exercising Convention powers and that it does not seek to codify the entire law relating to dealings with children about whom it is argued there are jurisdictional questions or about whom it is argued their welfare requires them to be taken to another country. In my view, if I concluded that this was a Hague child who had been wrongfully removed or retained, and that more than one year had passed prior to application being made, and I was satisfied the child was settled in her new environment, that would be the end of the matter under the Hague Convention and under the Regulations.

There is no application before this court seeking the exercise of Family Law Act jurisdiction, or cross-vested common law jurisdiction, seeking the return of the child to the United States.

Is the child settled?

The issue of whether the child N is settled in her new environment is not an easy issue in this particular case, mainly because there is virtually no evidence about it, and in any event the mother states that it is her proposal to remove the child from Malaysia in the foreseeable future and bring the child to Australia, thus disrupting whatever elements of settlement there are in the child's present situation. In Graziano v Daniels (1991) 14 Fam LR 697 at 703 FLC 78-436 92,212, the Full Court of this Court, dealing with the test to be met in being so satisfied, said that:

The test must be more exacting then that the child is happy, secure and adjusted to the child's surrounding circumstances.

Their Honours cited with approval the observations of Bracewell J in Re N (Minors) (Abduction) where her Lordship said the abductor must:

. . .establish the degree of settlement which is more than mere adjustment to surroundings.

They indicated that a settlement issue had two constituent elements, both a physical element and an emotional element, and that the settlement needs to relate to the new environment; that is, the place, home, school, people, friends, activities and opportunities, and not simply to the relationship with the custodial parent which has always existed.

Some examples of the operation of this provision can be seen in the following cases. In Rodriguez v Bucholzer 7 Ob 573/90, an Austrian Supreme Court refused to return a three year-old child to Spain some two years after her abduction, there being evidence that the child spoke no Spanish and was living comfortably and happily with her mother and maternal grandparents on an Austrian farm. In Re N (Minors) (Abduction) Bracewell J ordered the return of two children to Texas, notwithstanding they were content to be with their mother in the United Kingdom. In Graziano v Daniels the children were returned to California from Tasmania. Finally, in Coffeld 644 NE 2d 662, a decision of the Ohio Appeals

Court, (see: www.Hiltonhouse.com) the Ohio Appellate Court ordered the return of a child to Australia three years after the child had been abducted by the father from Australia. There appears to be a tendency in some of the cases to differentiate between an abducting custodian and an abducting non-custodian. There is a danger in so doing. The Convention and the Regulations draw no distinction. In ; ZP v PS (1994) 17 Fam LR 600 FLC 92-480, a decision of the High Court which dealt with a non-Hague abduction, Deane and Gaudron JJ indicated (at Fam LR 623; FLC 81,012) that a court exercising common law power might be more hesitant to order the return of an abducting custodial parent than an abducting non-custodial parent.

In my view, such considerations can and ought play little part in the exercise of any discretion that arises under the Hague Convention. Certainly that ought not to be an issue in determining whether there has been a wrongful removal or determining whether or not the child is settled in its new environment.

It is clear from the passage that I made reference to in Perez-Vera's explanatory report and from the literal words of both the Regulations and the Convention, that there is an onus upon the person who asserts that the child is settled in its new environment to establish that fact. In this case I have absolutely no material at all on the point. There is no complaint from the father that the child is unsettled nor any assertion by the mother that it is settled. I simply have the fact that the child was removed to Malaysia by the mother without the father's consent, that he has seen the child and he has been in contact with the child and no more.

I do not know whether the child pines for the father or does not pine for the father. I do not know whether the child has become imbued with the culture of her surrounds. I do not know whether the child is suffering from American cultural withdrawal symptoms. I know nought in respect of those matters and they are further clouded by the fact that the mother is choosing, in any event, to elect to remove the child from that culture and bring it to this culture. I must therefore conclude, on the material before me, that I am not satisfied that the child is settled in his or her new environment. Accordingly the child is therefore a child whose return I must order unless the child fits within one of the other exceptions which are referred to in regs 16(2) and (3). If the child does not fall within any of the reg 16(2) exceptions but does fall within any of the reg 16(3) exceptions then I have a discretion in the matter.

Regulation 16(2) provides as follows:

The Court must refuse to make an order under sub-regulation (1) if it is satisfied that:

- **a. the removal or retention of the child is not a removal or retention of the child within the meaning of these Regulations; or**
- **b. the child was not an habitual resident of a Convention, country immediately before his or her removal or retention; or**
- **c. the child had attained the age of 16; or**
- **d. the child was removed to or retained in Australia from a country that, when the child was removed to or first retained in Australia was not a Convention country; or**
- **e. the child is not in Australia.**

It is not suggested by Mr Scarfo on behalf of the mother that any of the reg 16(2) exceptions apply.

Acquiescence

I move to reg 16(3) which sets out grounds upon which the court may refuse to make an order for mandatory return if a person opposing return establishes on of the grounds. Again, clearly, there is an onus upon the person opposing the return, who I can for sake of convenience call the abducting parent. The regulation 16(3) ground that was relied upon in this case was that the person making application for the return of the child, the father:

Had consented or subsequently acquiesced in the child being removed to or retained in Australia.

Again the reference to Australia after the removal causes some degree of conflict with the words of the Convention. The exceptions set out in Art 13 of the Convention make reference to acquiescence in "the removal or retention". As I have already indicated, the act of removal is the crossing of the international border of the country from where the child should not have been removed in the first place; that is from the United States of America. So, really, the issue is whether the father consented to or subsequently acquiesced in the child being removed from the United States of America rather than being removed to Australia.

The acquiescence is said to take two forms. It is said that the non-action of the father once the child reached Malaysia, coupled with his visit to Malaysia, represents one aspect of the acquiescence whereby it can be said that he has tacitly agreed that the child should stay with the mother or that he has accepted the wrongful removal. Alternatively, the signing of the immigration consent is said to be clear evidence of actual or tacit acquiescence in the child being lawfully in the mother's care outside of the United States of America.

The document itself, however, really says no more than as follows, and I read it from the perspective of the father rather than in the actual words contained which contain with both parents:

I, the father of N, hereby consent to her to travel to Australia with her mother to visit Melbourne for a period of 2 1/2 weeks and I undertake to pay her expenses and guarantee her departure from Australia at the end of the authorised period.

Here is a father who is seeking an opportunity to invoke the Convention. In order for it to be invoked the child needs to be in a country which has introduced the Convention into its domestic law. The father, not knowing whether or not Australia was a Convention country but believing it might be said:

> **. . .of course I give permission to the Australian Government to allow my child to travel to Australia and I guarantee that I will arrange the departure of the child from Australia at the end of the authorised stay period.**

The father did not want the child to remain in Australia; he had no intention of it remaining in Australia. He wanted the child to come to Australia in the mother's care so that he could commence these proceedings. In my view, in the circumstances of this case, the letter of consent does not amount to him having acquiesced in the wrongful removal by the mother of the child.

More problematic is his non-action for the past 18 months or so. The issue of acquiescence is not one that is capable of being simply determined. The English courts have been most active in writing on the issue of acquiescence. There have been discernible moves in the English courts in respect of this issue. Many of the cases are difficult to reconcile. Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 involved the removal of children from Australia

to the United Kingdom. The father being unaware of the Hague Convention wrote a letter to the mother saying:

I suppose there is nothing I can do about it therefore I have to accept your decision.

Later the same day, he learned of the Hague Convention and then commenced proceedings under it. The English court held that he had acquiesced by the writing of the letter. They held that acquiescence was a single specific action and that once that action had occurred the provisions of Art 13(a) had been carried out. Once you have acquiesced, effectively, you cannot un-acquiesce.

There was an attempt in subsequent English cases to retreat somewhat from that position and to stiffen the test of acquiescence. I make reference to Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 where Butler-Sloss LJ said that:

> **Acquiescence had to be conduct which was inconsistent with the summary return of a child to a place of habitual residence.**

In Re AZ Sir Donald Nicholls V-C defined the test as being:

> **Whether the parent had conducted himself in a way which would be inconsistent with him later seeking a summary order for the child's return. A consideration is to be undertaken . . . by looking at all the circumstances.**

It was suggested that in the application of that test to this case one needs to look at the circumstances of the child being taken to a non-Convention country and the father being told there was nothing he could do about it.

In Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819, the Court of Appeal dealt with a period of eight months of inactivity by a father who did not know he could do anything about it. After citing several of the authorities in this area Waite LJ said at 831:

> **There is a common thread that runs through all those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered "in all the circumstances" necessarily means that there will be occasions when the Court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court however not to give undue emphasis to those subjective elements: they remain an inherently less reliable guide than inferences drawn from overt acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken, it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as the judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?**

Well, in this case, can it be said that the father has conducted himself in a way which is inconsistent with him seeking a summary return? The case raises an as yet undecided issue. There was no capacity for the father to seek a summary return under the Hague Convention while the child was in Malaysia. Was his failure to seek a summary return according to the common law of Malaysia to be said to be acquiescence in the wrongful removal of the child to Malaysia? Has he acted in a manner inconsistent with his right to seek a summary return of the child under the Convention?

He says, "I was told by the District Attorney in Arkansas that there was nothing I could do". He says that he had been advised by his wife that her father was a powerful man in the country. He says that, "I never gave up wanting my child at home, and as soon as I found an opportunity to move under the Convention, I seized myself of that opportunity".

I will turn to my determination of this issue shortly, but I thought it appropriate to make reference to some other cases in respect of the acquiescence issue insofar as they may be of assistance.

There is a strict and narrow test set out by the United States Court of Appeals for the Sixth Circuit in Friedrich (1996) Fed Appeals 0085P, where the court said:

> **Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.**

More recently the Court of Appeal in H v H [1996] 2 FLR 570 appears to have removed itself back closer to the position adopted in Re A of which I have already stated I am critical. I have some degree of difficulty in accepting the decision in ; H v H as being consistent with the development of the English decisions after ; Re A although Waite LJ is the author of many of them.

In H v H some Israeli children of Orthodox Jewish faith were wrongfully removed from Israel to England. The father first sought to have the matter dealt with by his local religious tribunal who summonsed the mother. She ignored their summonses. It was only when it became apparent that the local religious tribunal was not going to be a useful exercise for the father that he commenced proceedings under the Convention. The judge at first instance ordered the summary return of the children.

The Court of Appeal held that the behaviour of the father taking active steps towards the settlement or adjudication of the matrimonial differences through the medium of the Beth Din without the making of any overt statement that he was insisting upon summary return of the children supported an inference of acquiescence. I must say, as I have indicated, I have some degree of difficulty with the conclusions of the Court of Appeal in that case.

Be that as it may, it seems to me that this father was between a rock and a hard place with respect to the mother's behaviour. The mother had taken refuge in a country which had not executed any agreement with the United States of America. The mother is a native of that country; the father was an alien in the country. The father is a man with apparently no or extremely limited financial means; the wife is highly educated and has, what I would describe, in general terms, as significant advantages of local knowledge in the situation. Can it be said in those circumstances that the father had acquiesced in the mother's wrongful removal of the child from the United States of America? In my view, the answer to that question is no. Accordingly, in my view, the issue as to whether or not a discretionary order

needs to be made in this case does not arise. However, if I am wrong on that issue I need to voice my views as to the exercise of discretion.

Discretion

It is suggested in H v H by the Court of Appeal that when one comes to exercise a discretion in respect of Convention cases, one ought to consider the likely outcome of the substantive proceedings. This is the spectre which raises the type of element to which I have already referred of creating a distinction between an abducting custodial parent and an abducting non-custodial parent.

It may well be, as I indicated to the parties in discussion, that upon the mother's return to the jurisdiction in the United States of America, the United States courts will say that she should not have behaved in the way she has behaved but that the welfare of the child demands in the circumstances that the mother and child be free to leave the United States providing adequate arrangements can be made to secure future contact between the father and the child.

In H v H when indicating that the trial judge's discretion had not been properly exercised. Waite LJ said at 577:

> **He also failed to consider the likely outcome of the substantive proceedings. That was unfortunate, because in a case where the children are so young and their mother claims that she cannot endure living in Israel, there must be at least a possibility that the Court (in either jurisdiction) would regard it as adverse to the best interests of the children to compel her to live in a country where she is deeply unhappy, and would conclude that for the time being they ought to have their primary home in her care in England.**

His Lordship then went on to exercise the discretion and said that the factors in that case pointed overwhelmingly in favour of allowing the substantive proceedings to continue in the United Kingdom where the father would be accorded a hearing no less sympathetic to his claims to serve the welfare of the children.

Now, I do not have that luxury in this case. This is not a case in which substantive proceedings as to the welfare of this child can be heard in Australia in the foreseeable future. The mother is here on a most transitory basis. She is expressing a view that she wishes to return but that matter is clouded in uncertainty, and my choice appears to be either that the child returns to the United States of America, which Court was properly seized with the jurisdictional issue, where a hearing can be heard on the merits as to the welfare of the child or that the child returns to Malaysia where it is unlikely that the hearing on the merits can realistically take place, given the father's total lack of funds and given the absence before me of any evidence that the Malaysian legal system will provide the father with a fair and reasonable hearing in which all of the issues relating to the welfare of the child can be properly explored.

Normally I would proceed on an assumption that foreign law in this particular area, unless otherwise proven, is likely to coincide with Australian law: see In the Marriage of Toric (1981) 7 Fam LR 370 FLC 91-046. There are, for reasons well known to students of recent Australian and Malaysian jurisprudential history, some reason to doubt whether that assumption is safe to make in respect to the Family Law aspects of Malaysia. Many Malaysians would appear to have a similar view about Australian Family Law.

In the circumstances I face a different dilemma to that faced in H v H where an English mother had taken Israeli children to England and indicated she was not returning to Israel, and the English courts felt confident that they could then deal with the issue and give the father a fair hearing on the question of the welfare of the child. I do not, as I have indicated, have the luxury of being able to say with absolute confidence that the Malaysian legal system will give this man just as fair a hearing as he would get in the United States of America, before the relevant court in Arkansas. I have no information about that and the mother's legal advisers have not sought to put any before me.

There is another irony in this case in that the father now lives in Florida and there are some jurisprudential issues to be raised under the United States of America Uniform Child Custody Jurisdiction Act (the UCCJA) as to which court within America has the appropriate jurisdiction. My prima facie would seem to indicate that probably Arkansas has adequate jurisdiction, I refer particularly to chapter 9.13.203 of the Arkansas Civil Code which enacts the UCCJA, there being no other state which would have jurisdiction under perquisites substantially in accordance with subdivisions 1, 2 and 3 of that section, namely, home state of child at the time of commencement of proceeding, or home state of child within six months before commencement of proceeding. In any event the child would have significant connection with the state in any event because of the previous residence of both parents within Arkansas and the making of the orders within Arkansas.

Conclusion

It follows from what I have said that it is my melancholy task to require the return of this child to the United States. In summary I do so for the following reasons:

1. **the child was clearly wrongfully removed from the United States;**
2. **there is no other court that I can see that is likely to provide both parties with a fair and reasonable opportunity to vent their dispute;**
3. **the aim of the Convention is to prevent the evil that occurred in the consultation of the other parent who has and is exercising some custodial rights over the child.**

The preamble to the Convention recites the firm conviction of the state parties "that the interests of children are of paramount importance in matters relating to their custody" and their desire (i) "to protect children internationally from the harmful effects of their wrongful removal or retention" and (ii) "to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".

The objects of the Convention, as stated in Art 1, are:

a. **to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and**
b. **to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.**

1. **The only element that operates in favour of the wife, in my view, is the passage of time and that is tempered by the lack of her presence inside a Convention country and the lack of any evidence that would suggest that she is unable to adequately conduct the proceedings herself in Arkansas.**

It seems to me, in the circumstances, that N should return with the mother to Arkansas. This raises a number of logistical difficulties. I am told the parties can resolve those difficulties and I propose to stand the matter down to enable them to prepare some minutes.

ORDER:

(1) Subject to any further application being made to me I propose that the child return to the United States within 10 days of this date. The parties can have counselling in the meantime, and maybe alleviate the necessity for the return in any event. I do not in the circumstances propose to make any order for costs.

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